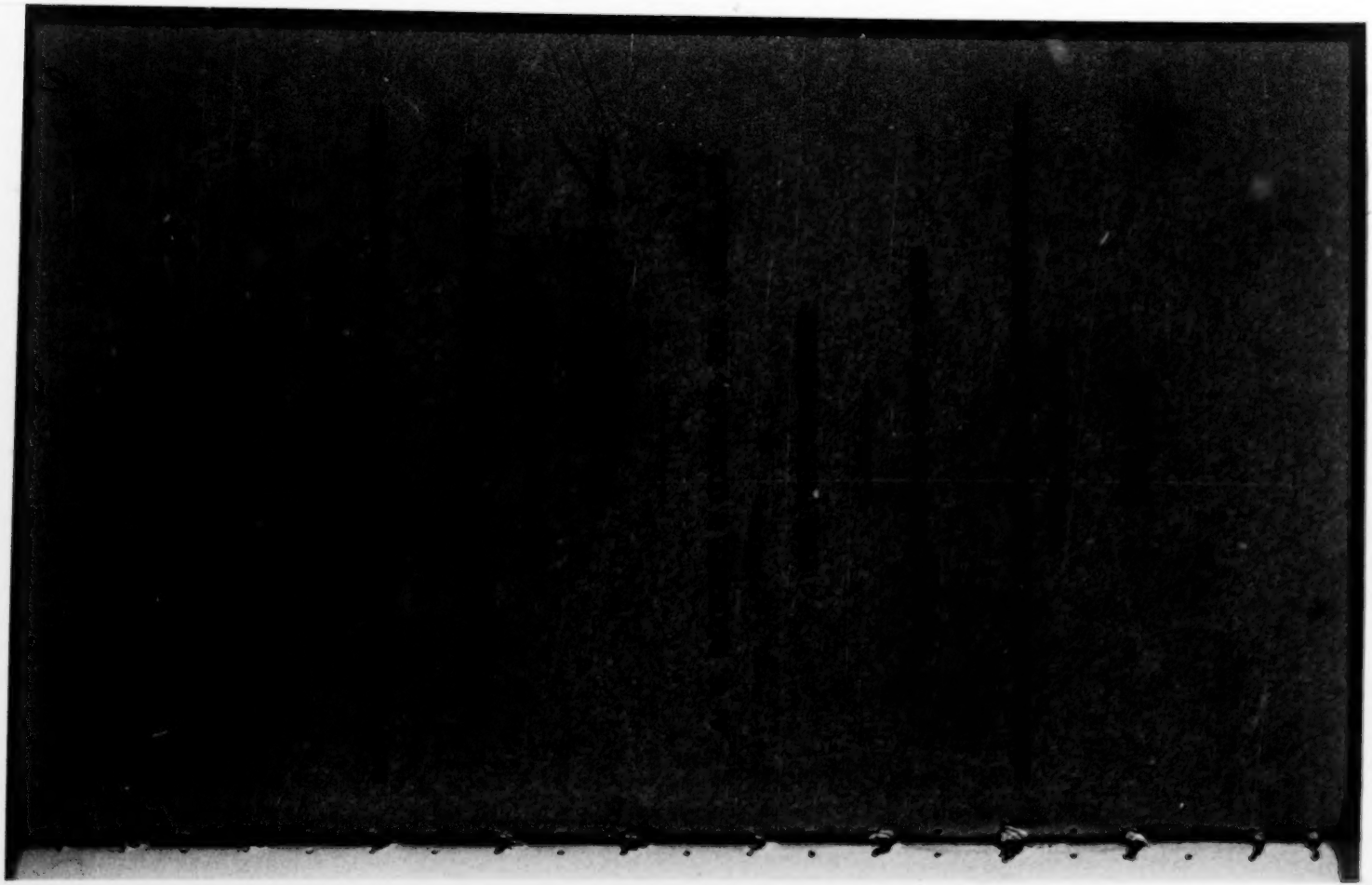

(29,719)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 409

. W. DUCKETT & COMPANY, INC., APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 10, 1923

. 1] IN THE

ITED STATES COURT OF CLAIMS, WASHINGTON, D. C.

Number 34218

A. W. DUCKETT & COMPANY, INC.

vs.

THE UNITED STATES OF AMERICA.

PETITION—Filed Oct. 31, 1919

the Honorable the Court of Claims of the United States:

Plaintiff, through its attorneys, Almy, Van Gordon & Evans, re-etfully shows:

. Plaintiff is a corporation, organized and doing business under l by virtue of the laws of the State of New York, with its princi- offices at Seventeen (17) Battery Place, Borough of Manhattan, nty, State and City of New York.

. The United States is sued herein upon an implied contract with Government of the United States under the general jurisdiction his Court, conferred by Chapter 7, Section 145 of the Judicial le of the United States.

. Plaintiff was on and prior to January the 30, 1918, the lessee, l as such was in peaceful possession of a certain pier or wharf, mmonly known as pier number eight (8), owned by the Bush rminal Company, Borough of Brooklyn, City of New York; that opy of the lease, under which plaintiff operated and enjoyed the of the said pier, is attached hereto and made a part hereof, and rked exhibit one (1).

l. 2] 4. Plaintiff was entitled to the peaceful possession and use the said pier to and including September the 30, 1919, by virtue the said lease; copy of which is marked exhibit one (1) and at-hed hereto.

. Defendant on or about January the 31st, 1918, requisitioned said pier and all the rights and privileges accruing to the plain- under said lease beforementioned, and that plaintiff did peace-ly surrender to one Hayden S. Cole, who represented himself to an officer, and was in fact an officer in the United States Army, gned to the duty of taking charge of docks, wharfs and terminals the War Department, the plaintiff believing that such peaceful render of the said lease and possession of the said pier was pur-nt to the orders of the War Department, and it was in fact pur-nt to the orders of the War Department.

6. Plaintiff has been deprived of the possession, use and benefit of the said pier and the rights and privileges accruing under the said lease for a period of Six-hundred and seven (607) days, to-wit, from January the 31st, 1918, to September the 30th, 1919, on account of the said requisitioning and occupation by defendant.

7. A reasonable value for the use of said pier was Four Hundred ($400.00) Dollars per day, totaling the sum of Two Hundred and Forty-two Thousand and Eight Hundred ($242,800.00) Dollars.

8. Plaintiff is entirely and exclusively entitled to receive compensation in advance for the use of said pier by defendant from January the 31st, 1918, to September 30th, 1919.

9. Defendant has damaged your petitioner in the sum of Two Hundred and Forty-two Thousand and Eight Hundred ($242,800.00) Dollars, all of which has resulted in great inconvenience and hardship to said plaintiff and the said plaintiff has demanded of said [fol. 3] defendant payment in full of the amount before-mentioned, which payment has been refused.

Wherefore, plaintiff prays for a judgment or decree against the United States of America for the sum of Two Hundred and Forty-two Thousand and Eight Hundred ($242,800.00) Dollars, with interest thereon from the 31st day of January, 1918, together with all reasonable costs and disbursements, including reasonable attorneys' fees, and for such other and further relief in the premises as the Court may, in its wisdom, deem proper.

A. W. Duckett & Company, Inc., By D. F. Leary, President.
Almy, Van Gordon & Evans, Plaintiff's Attorneys, 46 Cedar Street, Borough of Manhattan, County, State and City of New York.

County, State and City of New York,
Borough of Manhattan, ss:

Daniel F. Leary, being duly sworn, deposes and says: I am the President of the A. W. Duckett & Company, Inc., plaintiff herein.

The foregoing petition is true to the best of my knowledge and belief, except as to the matters therein stated to be alleged upon information, and as to those matters I believe it to be true.

D. F. Leary.

Sworn to and subscribed before me this — day of ——, 1919. ——: ——.

[fol. 4] Know all men by these presents that A. W. Duckett & Company, a corporation under the laws of the State of New York, does hereby make, constitute and appoint Almy, Van Gordon and Evans, as and for its attorney, to prosecute before the Court of Claims a suit against the United States as set forth in the enclosed

ition and does hereby ratify and confirm all and any matters prosecuted by said Almy, Van Gordon and Evans.

Signed and sealed this — ——, 1919.

A. W. Duckett & Company, D. F. Leary, Pres. (Seal.)

ol. 5] EXHIBIT ONE TO PETITION

This Agreement, made this 19th day of September, 1916, between uth Terminal Company, a corporation organized and existing ıder the laws of the State of New York, party of the first, and W. Duckett & Company, Inc., a corporation organized and exist- g under the laws of the State of New York, party of the second rt,

Witnesseth:

That the party of the first part for and in consideration of the nts, agreements and covenants of the party of the second part ercin contained, has demised, leased and let, and by these presents ɔth demise, lease and let unto the said party of the second part, s successors and assigns, all that certain Pier of the party of the rst part number 8, situated at the foot of 39th Street in the Bor- ıgh of Brooklyn, City of New York, as shown on the map or iagram attached hereto and made a part of this lease, being the hole of said Pier of a length of approximately six hundred and venty-five (625) feet, and in width sixty (60) feet, together with ne right, subject to the limitations hereinafter contained, to use ne-half of the slip adjoining said demised Pier on the south side nereof.

To have and to hold the above demised premises unto the party f the second part, its successors and assigns, for the term of three 3) years, beginning on the first day of October, 1916, at the annual ental of Sixty thousand ($60,000) Dollars, payable in equal nonthly installments on the first day of each and every month dur- ng said term, at the office of the party of the first part, No. 100 Broad Street, in the Borough of Manhattan, City of New York.

The party of the first part further covenants and agrees with the ɔarty of the second part, and its successors and assigns, as follows: To maintain a depth of water on the south side of the pier demised of not less than thirty (30) feet at mean low water; said depth to [fol. 6] begin at a point not less than eight (8) feet from the side of the pier, and to parallel the entire length of the same to a width of not less than 100 feet. The party of the first part further agrees that it will, as often as notice is received in writing from the party of the second part that two feet or more of fill have come into the dredged out portion, or into any part of the same where such fill interferes with navigation, re-dredge the same without cost or charge to the party of the second part.

In case any portion of the demised premises are so injured or destroyed by fire, or the elements, or the act of God, as to make it impossible to use them for the business of the party of the second part,

then the party of the first part agrees to rebuild or repair the same as speedily as possible, and in the meantime furnish, if possible, at another pier or piers upon its property, sufficient accommodation for the steamers of the party of the second part during such period as is occupied by the rebuilding or repair of the demised premises so destroyed or injured; and if such accommodation is not furnished to the party of the second part, no rent shall be paid or payable by the party of the second part until such repairs are completed, and if such rebuilding is not undertaken, or repairs made, within a reasonable time, the party of the second part may, at its option, surrender said demised premises to the party of the first part, whereupon this lease shall become null and void.

The party of the first part hereby covenants and agrees with the party of the second part, its successors and assigns, to keep said demises, during the term of this lease, in good repair, at its own expense, except that, in the event that such repairs shall be made necessary by the negligence of the party of the second part, its agents or servants, the cost of such repairs shall be borne by the said party of the second part.

Said party of the first part further covenants and agrees to maintain in the demised premises a suitable supply pipe for water, and [fol. 7] also to string electric wires and furnish lights and switches throughout the demised premises as, where and when required by the party of the second part for the furnishing of lights and power. The party of the second part shall provide for water and electricity, which shall be acceptable to the party of the first part and shall pay for such service as registered by such meters, according to the schedule of rates now adopted, or which may hereafter be adopted by the party of the first part for such service, or the party of the second part may for such service at such rates as are now or may hereafter be offered under written contract by the Edison Electric Illuminating Company of Brooklyn for the furnishing of a similar service.

The party of the first part covenants and agrees that the party of the second part shall have at all times during the term of this lease unrestricted access to and from the demised premises and that the roadway now existing shall at all times be maintained by the party of the first part in proper condition for the uses and purposes hereinafter described of the party of the second part.

Said party of the first part further covenants and agrees with the party of the second part, its successors and assigns, at all times to warrant and defend the possession and use of the premises hereby leased.

The said party of the second part does covenant and agree with the party of the first part, its successors and assigns as follows:

To pay unto the said party of the first part, its successors and assigns, the above mentioned rent at the time and place stated for the payment thereof.

To commit no waste of said demised premises, nor suffer waste to be committed by others, and to surrender the said premises at the

nination of this lease in the same condition as when received,
onable wear and tear excepted.
. 8] Not to pledge nor assign this lease, or rent out, underlet
ease said premises, or any part thereof, or make any alterations
rein, without the written consent of the party of the first part, but
s understood that the party of the first part will not withhold
h consent unless, in its judgment, it has reasonable ground to
so.
Not to block the slip adjoining said demised premises with light-
or bargers, or in any manner, so as to prevent the passage of
hters, vessels or barges to other parts of the slip, and it hereby
rees to haul out of the way any vessel of its own or under its
ntrol, except a steamer lying alongside the pier and to cause to be
uled out of the way of any vessel, lighters or barges at the request
the party of the first, or its representatives, when such vessels,
hters or bargers may block the slip on the side of the herein de-
sed premises; railroad carfloats which are unwieldy, and which
terfere with the general use of the slip, shall not be received at
e herein demised premises without special permission from the
rty of the first part. In the event that the party of the second part
ils or refuses, after reasonable notice and request, to move any ves-
l or floating structure whatsoever belonging to it, or under its
ntrol, the party of the first part shall have the right to move such
ssel or floating structure itself and charge the expense of such
oving unto the party of the second part.
The party of the first part may collect from the owners or con-
gnees thereof and retain for its own use and benefits the customary
orage, labor and landing charges on goods arriving by the steam-
s of the party of the second part, and stored with the party of the
rst part, or stored on the demised premises; said charges shall not
e made, if not customary to the trade, or be more than upon goods
rought by competing lines. The party of the first part shall have
fol. 9] the right to collect and retain legal wharfage on all canal
oats, barges, lighters or other harbor craft while lying at the pier
ereby demised.
The party of the second part further convenants and agrees that
t will, at its own expense, comply with all the requirements, pres-
nt and future, of the Board of Health, Municipal authorities and
Police and Fire Departments of the City of New York, and of any
ther lawfully constituted authority, and will comply with all rules
nd regulations of the New York Board of Fire Underwriters, and
he New York Fire Insurance Exchange, relating to the herein
demised premises, and will not allow smoking, or the use of kerosene
lamps upon the demised premises, but the party of the second part
shall not be responsible for any damage resulting from smoking or
the use of kerosene lamps, contrary to its rules and regulations.
The party of the second part further covenants and agrees with
the party of the first part to hold the latter harmless against any
suit, claim, judgment or recovery on the part of any person against
it, the party of the first part, by reason of any act or omission of

any person other than an agent or servant of the party of the first part, done or emitted on the premises hereby demised.

And the party of the second part further covenants and agrees with the party of the first part that in case the rent herein reserved be not paid in the manner and at the time herein provided, or in case the pier hereby demised shall be or become deserted or vacated, the term of this lease shall expire, at the option of the party of the first part, upon its giving three (3) days' notice in writing of its election to consider this lease terminated to the party of the second part, which notice may be given personally or by mail at the demised premises; thereupon this lease shall be deemed to have ceased and come to and end at the time fixed in the notice, in the same manner [fol. 10] and with the same effect as if the date fixed by said notice was the date originally stated herein for the expiration of the term of this lease, and the party of the first part shall have the right to enter the premises, either by force or otherwise, without being liable for any prosecution therefor, or the said party of the first part may take possession of the said premises by summary proceedings, by action or ejectment or by any other judicial proceedings appropriate to the case, or without legal proceedings whatsoever, and may re-let said premises at its option as the agent of said party of the second part, or otherwise, and receive the rent therefor, applying the same first to the payment of such expenses as it may have been put to in entering, dispossessing and letting and then to the payment of the rent and the fulfillment of the covenants of the party of the second part hereunder, and said party of the second part shall be liable as damages for any loss which may be sustained by reason of such default during the remainder of the term, whether the demised premises be re-let or remain vacant, such loss to be payable on the same days whereon the rent herein reserved would have become due but for the happening of such event, and the maintenance of any action or proceeding to recover any installment or installments thereof shall not preclude the party of the first part from thereafter maintaining and instituting subsequent actions or proceedings for the recovery of any subsequent installment or installments thereof. The party of the second part hereby expressly waives any notice of proceedings required by law to be given or taken preliminary to the entry or re-entry of the party of the first part, and any such entry or re-entry whatsoever shall not be deemed to absolve or discharge the said party of the second part from liability hereunder.

And the party of the second part further covenants and agrees with the party of the first part that in case of the violation by it of any of the covenants of this agreement (including the failure of [fol. 11] the party of the second part to pay the rent reserved herein, wholly or in part), then at the option of the said party of the first part, this lease shall become null and void, upon its giving the party of the second part three (3) days' notice in writing of its election to consider this lease terminated, all as provided in the preceding paragraph herein, whereupon this lease shall cease and come

to an end at the time and in the manner and with the effect specified in said paragraph, and with all the consequences, rights and liabilities of either party as set forth therein.

Anything herein contained to the contrary notwithstanding, it is hereby understood and agreed that, if at any time during the term above specified or any renewal or extension thereof, the party of the second part shall become insolvent or take the benefit of any insolvent act, or shall make an assignment for the benefit of creditors, or file a petition in bankruptcy or be adjudicated a bankrupt or a receiver or trustee of the property of the party of the second part shall be appointed by any Court in any legal proceeding, or this lease devolve upon or pass to any person or persons other than the party of the second part by operation of law or otherwise, then in each of such cases (without regard to the length of the term of this lease), it shall and may be lawful for the party of the first part, at its election, to declare this lease terminated in the manner and with the results set forth in the last preceding paragraph.

The party of the second part in consideration of the premises expressly waives any provision of law now in force, or hereafter enacted, giving to the party of the second part the right upon any conditions after default, to redeem and re-possess the said premises or any part thereof.

It is further understood and agreed that the covenants and agreements contained within this lease shall be binding upon the parties hereto and their legal representatives.

[fol. 12] In witness whereof, the party of the first part has caused its corporate name to be signed to these presents and its corporate seal to be hereunto affixed, and the party of the second part has caused its corporate name to be signed to these presents and its corporate seal to be hereunto affixed, all the day and year first above written.

Bush Terminal Company, (Sgd.) By R. G. Simonds, Vice-President. Witness: (Sgd.) A. M. Woodruff. A. W. Duckett & Co., Inc., (Sgd.) By A. W. Duckett, President. Witness: (Sgd.) D. F. Leary.

STATE OF NEW YORK,
County of New York, ss:

On this 21st day of September, One thousand nine hundred and sixteen, before me personally came and appeared R. Gould Simonds, to me known and known to me, who being by me duly sworn did depose and say that he resides in the Borough of Brooklyn, City of New York; that he is the Vice-President of Bush Terminal Company, one of the corporations described in and which executed the foregoing lease; that he knows the seal of said corporation, that the seal affixed to said lease is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Sgd.) Ainley W. Jones, Commissioner of Deeds.

[fol. 13] STATE OF NEW YORK,
County of New York, ss:

On this 21st day of September, One thousand nine hundred and sixteen, before me personally came and appeared A. W. Duckett, to me known and known to me, who being by me duly sworn did depose and say that he resides in the Borough of Manhattan, City of New York; that he is the President of A. W. Duckett & Co., Inc., one of the corporations described in and which executed the foregoing lease; that he knows the seal of said corporation; that the seal affixed to said lease is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Sgd.) Ainley W. Jones, Commissioner of Deeds.

[fol. 14] IN THE COURT OF APPEALS

II. GENERAL TRAVERSE—Filed Dec. 31, 1919

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

IN THE COURT OF APPEALS

III. ARGUMENT AND SUBMISSION OF CASE

On February 13 and 14, 1923, this case was argued and submitted on merits by Messrs. Don R. Almy and Ernie Adamson, for the plaintiff, and Messrs. W. F. Norris and Howard W. Ameli, for the defendant.

[fol. 15] IN THE COURT OF CLAIMS

IV. FINDINGS OF FACT, CONCLUSION OF LAW, AND OPINION OF THE COURT BY DOWNEY, J.—Entered Apr. 16, 1923

This case having been heard by the Court of Claims, the court, upon evidence, makes the following:

FINDINGS OF FACT

I

A. W. Duckett & Co. (Inc.) the plaintiff herein is and at times hereinafter mentioned was a corporation organized and doing business under and by virtue of the laws of the State of New York, with its principal place of business in the city of New York.

By its certificate of incorporation executed June 10, 1910, it was
horized—

"To engage generally in the business of ship brokers; to act as
ents and brokers for steamships, railroads, or any other corpora-
ns, firms, or individuals; to make contracts with reference to the
rchase, chartering, and operation of steamships, but not to act as
mmon carriers in any capacity whatsoever; to buy, lease, build,
d own salesrooms, storerooms, storehouses, warehouses, docks, piers,
d all other personal property and real estate necessary to the carry-
g on of such business; to buy, sell, and otherwise dispose of, hold,
n, manufacture, produce, export, and import, and deal in, either
principal or agent and upon commission or otherwise, all kinds of
rsonal property whatsoever, other than bills of exchange; to make
d enter into all manner and kinds of contracts, agreements, and
ligations by or with any persons or corporations for the purchasing,
quiring, manufacturing, repairing, selling, and dealing in any
icles of personal property of any kind or nature whatsoever other
an bills of exchange, and generally with full power to perform
y and all acts connected herewith, or rights thereunder or inci-
ntal thereto, and all acts proper or necessary for the purposes of
e business."

The number of shares of its capital stock was 100 of the par value
$50 each and the amount of capital with which it was authorized
begin business was $500.

From August 24, 1917, to February 11, 1919 of the period in-
lved herein, the business of the plaintiff was in the hands of John
Sheppard, jr., as temporary receiver appointed by the judge of
e District Court of the United States for the Southern District of
w York.

II

On the 19th day of September, 1916, by a certain instrument in
iting, a copy of which marked "Exhibit One" is attached to the
ol. 16] petition herein and made a part thereof by reference and is
reference made a part hereof, plaintiff leased from the Bush Ter-
nal Company its Pier #8, in the Borough of Brooklyn, for the
riod of three years beginning on the first day of October, 1916, at
annual rental of sixty thousand dollars, payable in equal monthly
stallments on the first day of each month during the term of the
se. Plaintiff entered into possession of said pier under said lease
d used it in connection with and as a part of its business and
s so in possession thereof until the appointment of said receiver,
d said receiver thereafter continued in possession of and used
d pier until possession thereof was taken over by the United
ates when and as hereinafter found.

III

The Bush Terminal, owned and operated by the Bush Terminal
mpany, consisted in part of eight large piers, numerous large
rehouse buildings, and railroad tracks extending from main-line
ilroads to said warehouses and on to said piers.

IV

Pursuant to the authority vested in the President of the United States by the act of Congress, approved August 29, 1916, 39 Stat. 645, and by section 10 of the act of Congress, approved August 10, 1917, 40 Stat. 276, the Secretary of War by direction of the President of the United States took possession of the Bush Terminal in New York Harbor, including Pier 8, thereof aforesaid, evidencing said act by a general order as follows:

War Department,
Washington, December 31, 1917.

To whom it may concern:

Pursuant to the authority vested in the President by the act of Congress approved August 29, 1916, 39 Stat. 645, providing for possession and control of systems of transportation, and by section 10 of the act of Congress approved August 10, 1917, Pub. No. 41, 65th Cong., authorizing the requisitioning of storage facilities for supplies connected with the common defense, possession, and control is hereby taken, by direction of the President, of the following described parts of a system of transportation, including storage facilities; that is to say, of those portions of the Bush Terminal docks and warehouse property described in Schedule "A," and shown on the map of schedule "B," hereto annexed, in New York Harbor, to the end that they may be utilized to the exclusion of all other traffic, so far as may be necessary, and for such time as may be required, for the transportation of troops, war material, and equipment, for the storage of military supplies, and for such other purposes connected with the emergency as may be needful or desirable. Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises, and also the fair compensation to be paid for the property in the event that the Government shall determine prior to July 1, 1918, to acquire absolute title thereto.

Done at the City of Washington this 31st day of December, 1917.

Newton D. Baker, Secretary of War.

[fol. 17] And thereafter there was addressed to the Bush Terminal Company by the Acting Quartermaster General a notice as follows:

War Department.
Washington, January 3, 1918.

In reply refer to 825.1—T (Bush Terminal.)
From: Acting Quartermaster General.
To: Bush Terminal Company, 100 Broad Street, New York, N. Y.
Subject: Requisition of Bush Terminals.

1. Pursuant to the authority vested in the President by the act of Congress approved August 29, 1916, 39 Stat. 645, providing for possession and control of systems of transportation, and by section

10 of the act of Congress approved August 10, 1917, Pub. No. 41, 35th Cong., authorizing the requisitioning of storage facilities for supplies connected with the common defense, possession and control is hereby taken, by direction of the President, of the following described parts of a system of transportation, including storage facilities; that is to say, of those portions of the Bush Terminal docks and warehouse property described in Schedule "A," and shown on the map on Schedule "B," on file in this office, in New York Harbor, to the end that they may be utilized to the exclusion of all other traffic, so far as may be necessary, and for such time as may be required, for the transportation of troops, war material, and equipment, for the storage of military supplies, and for such other purposes connected with the emergency as may be needful or desirable. Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises, and also the fair compensation to be paid for the property in the event that the Government shall determine prior to July 1, 1918, to acquire absolute title thereto.

George W. Goethals, Acting Quartermaster General. By D. L. Brainard, Brigadier General, Quartermaster Corps, N. A. BJB:mk.

And there was addressed to the General Superintendent of Army Transport Service the following:

[Telegram]

December 31, 1917.

Major General David C. Shanks,
General Superintendent Army Transport Service,
New York, N. Y.:

An order has been issued by the President this date for taking possession and assuming control of those portions of the Bush Terminal docks and warehouse property known to you and described in Schedule "A" and shown on the map on Schedule "B" attached hereto. In conformity with said order you will take possession and assume control of the premises from this date.

Goethals, Acting Quartermaster General.

(825.1—T Bush Terminal.—L.)

[fol. 18] V

Thereafter there was served upon the receiver of the plaintiff company, by the authorized officer of the United States in charge of docks, wharves and terminals, a notice as follows:

[Address reply to General Supt., A. T. Service, 104 Broad Street, N. Y. City.]

War Department

Office of the General Superintendent

U. S. Army Transport Service

New York, January 1, 1918. U. S. C.

From: Supervisor, Docks, Wharves and Terminals.
To: John S. Sheppard, receiver, Duckett & Co. (Inc.), 27 Cedar Street, N. Y. C.
Subject: Notice to vacate.

1. By authority of the President of the United States, the Bush Terminal has this day been requisitioned for the use of the embarkation service of the United States Army, and possession thereof has passed to the United States.

2. It is necessary that the Government have full benefit of these premises at the earliest possible date. It is desired, however, not to inconvenience the present occupants to the extent that may bring upon them any extensive financial losses. You will therefore immediately communicate with 1st Lieutenant H. S. Cole, U. S. A., retired, officer in charge of the Division of Docks, Wharves and Terminals of this office, and make arrangements for the vacation of the premises now occupied by you.

3. Until further notice, all payments or moneys due in respect of any period commencing on or after January 1, 1918, will be made to the Bush Terminal Company for account of the United States.

By authority of the general superintendent.

(Sgd.) Hayden S. Cole, 1st Lt., U. S. A., Officer in Charge of Div. of Docks, Wharves, and Terminals.

Due service of the annexed notice upon me as temporary receiver of A. W. Duckett & Company (Incorporated), at 27 Cedar Street, New York City, by the exhibition thereof and delivery of a copy thereof to me, John S. Sheppard, jr., as such receiver, is hereby admitted, this 14th day of January, 1918.

John S. Sheppard, Jr., As Temporary Receiver of A. W. Duckett & Company.

In consummation of negotiations between the receiver and the officer of the United States in charge of docks, involving some arrangements already made with reference to the unloading of a vessel at that pier, the receiver was permitted by said officer to remain in charge for the remainder of the month of January, and the United States took actual possession of the pier at midnight of January 31, 1918.

VI

When the terminal properties were taken over by the United tes a part thereof was in possession of the Bush Terminal Com- ıy unleased, and a part consisting of piers, pier space, ware- ıses, and wareh use space was under lease.

l. 19] An advance payment of one million dollars was made to Bush Terminal Company to be applied on compensation for the of the properties taken or upon the purchase price in the event United States should determine prior to July 1, 1918, to acquire e, and a board of appraisers was appointed by the Secretary of ır to determine proper compensation to be paid the Terminal Com- ıy for the use of the properties and also to determine the value of properties in the event the United States should conclude to uire title. Said board of appraisers made an award as follows:

'We, the undersigned, a board of appraisers, appointed pursuant the authority vested in the President of the United States by act Congress approval August 29, 1916, 39 Stat. 645, providing for possession and control of systems of transportation and by sec- n 10 of the act of Congress approved August 10, 1917, Pub. No. 65 Cong., authorizing the requisitioning of storage facilities for oplies connected with the common defence, for the purpose of as- taining the just compensation to be paid by the United States the temporary use and occupancy, injury, destruction, or pur- ase of that portion of the property owned by the Bush Terminal, uate at Brooklyn, Borough of Brooklyn, State of New York, as own on the map and plat of the Bush Terminal (Schedule B) filed th the report of the board of appraisers, having heard the proofs d allegations of the claimant and examined the matters submitted it, do report and award as follows:

"1. That the United States did requisition the temporary use and upancy of a portion of the premises known as the Bush Terminal, shown on the map and plat of the Bush Terminal filed with the port of the board of appraisers, marked "Schedule B," from the ird day of January, 1918, and still occupies the same; that just mpensation for the use and occupancy of that portion of said emises not under lease at the time the same was requisitioned is 9,807.71 per month or at the rate of $1,077,692.60 yearly, which id monthly sum is increased from time to time as the respective ases for other portions of said premises under lease at the date me was requisitioned terminate, and as further increased by the onthly reserve rent due to the Bush Terminal as provided by the spective leases (except the lease to Duckett & Co., Inc., for Pier 8, which reserved rent is reduced from $5,000 per month to $2,325 r month), and which reserved rent has heretofore been agreed all be paid to the Bush Terminal instead of to the respective nant.

"The said items of monthly rent for unleased space, increases aris- g from leases terminating, and the reserve rent from January 3, 918, to December 31, 1918, including interest thereon, amount to

the sum $1,934,463,63, from which shall be deducted the rent advanced to the Bush Terminal, with interest thereon to December 31, 1918, amounting to $1,053,500.00, leaving a balance due the Bush Terminal December 31, 1918, of $880,963.63. Award is accordingly so made as of December 31, 1918, to the Bush Terminal for $880,963.63.

"2. From the amount herein awarded should be deducted any and all sums collected by the Bush Terminal as rent from tenants who have occupied any of said premises after January 3, 1918.

[fol. 20] "3. The monthly just compensation to be paid the Bush Terminal at the end of each calendar month for the use and occupancy of the said premises after January 1, 1918, so long as the United States shall continue to use or occupy the same, is as follows:

"For that part of said premises which was not under lease January 3, 1918, the date same was requisitioned by the United States, the sum of $89,807.71 per month, or at the yearly rate of $1,077,692.60; and for the remaining several portions of said premises constituting the leased parts thereof, at the date same was requisitioned, as follows:"

There follows a schedule in forty-five items relating to piers, warehouses, warehouse space, etc., designated by number and followed by the monthly rental aggregating $63,105.52 per month, the rentals stated in the schedule being the rentals reserved in the leases of the various tenants except that the rental of Pier 8 was reduced from $5,000 per month as provided in the lease to $2,325 per month.

This award was accepted by the Bush Terminal Company and payment thereunder authorized by the Secretary of War and made.

VII

The receiver for the plaintiff company had paid to the Bush Terminal Company the rental as provided in the lease for the month of January but paid no rental thereafter. In the latter part of January a bill, in usual course, dated February 1st, for February rental under the lease was sent the receiver, who on January 30th, wrote the Bush Terminal Company stating that he had been served with notice to vacate the pier and had arranged with the officer in charge that the pier should be surrendered to the United States at midnight of January 31st, and in reply the Bush Terminal Company directed him to destroy the bill.

For the use of the pier in unloading a vessel during that part of the month of January subsequent to the service of the notice to vacate, during which period the receiver had been permitted by the officer in charge to remain in possession, the receiver collected and retained the charges. The unloading not being completed until some time in the month of February, the receiver, at the same time, by authority of the officer in charge collected the charges accruing during the month of February and paid that portion thereof to the United States.

For the period beginning February 1, 1918, the United States paid the Bush Terminal Company for the use of all the properties taken over, included in which was payment for the use of Pier 8 on the basis of $2,325 per month and the Bush Terminal Company accepted the payments made as full compensation for the use of all the properties taken.

VIII

At midnight of April 30, 1919, the United States vacated Pier 8 and surrendered possession thereof to the Bush Terminal Company, and that company executed to the United States a release as follows:

New York, N. Y., May 1, 1919.

Bush Terminal Company, in consideration of the return to it by the United States in good order and condition in complete state of repair, of premises known as Pier #8, located at Bush Terminal. [fol. 21] Brooklyn, New York, which return in said good order and condition and complete state of repair is hereby acknowledged to have been accomplished, does hereby forever release the United States from any and all claims from suit, debts, obligations, and liabilities of whatsoever kind and nature which may arise or may have arisen by reason of occupation of said premises by the United States under requisition by act of Congress, dated August 29th, 1916, but not including claims for supplies, material, labor, or services otherwise furnished to the Government prior to May 1st, 1919, and with the further exception of one year rental guarantee from date.

Bush Terminal Company, by R. G. Simonds, Vice President. Signed, sealed, and delivered in the presence of: John A. Heinrich. [Corporate seal impressed.]

IX

On April 12, 1919, the plaintiff company, being advised that the United States would shortly release Pier 8, notified the Bush Terminal Company that immediately upon such release it would take over the pier "as per lease dated September 19, 1916," the receipt of which communication the Terminal Company acknowledged on April 17th and said:

"The United States, as we are advised, proceeded upon the theory that our leases were not extinguished by their action in commandeering our property.

"If it is your desire to proceed upon that theory, and you will pay to us the rent reserved in your lease, and take credit only for the payment made to us by the Government, we will not object to your going into possession again."

On April 19th the Terminal Company requested of plaintiff a speedy reply to its letter of the 17th "in order that the matter of the occupancy of Pier #8 may be speedily disposed of" and on April 22d the plaintiff wrote the Terminal Company as follows:

"Replying to your favors of recent date with regard to the lease of Pier 8, we can not see that you are entitled to the difference between the rent reserved in the lease and the rent that you received from the Government.

"The seizure of the pier by the Government created a situation whereby you could not fulfill the terms of the lease because you could not give us possession of the pier and therefore the consideration for the rent reserved failed. We certainly do not intend to pay for what we did not get.

"We are content to stand upon the fair ground that the emergency under which the Government seized the pier suspended temporarily the lease between us, but now that the Government is returning the pier we intend to maintain our rights and insist upon possession from the day the Government vacates, under the terms of the lease.

"It seems to us that that is the fairest way for both of us to handle the situation, and we are advised that it is our right to demand possession of the pier when the Government vacates."

Thereafter the Bush Terminal Company, being advised by counsel that Duckett & Co., by reason of refusal to pay arrears of rental, had forfeited their rights under the lease and that the Terminal [fol. 22] Company was privileged to relet the pier to others, did so relet it, the time of such reletting not being shown, and at an increased rental.

X

Pier #8 of the Bush Terminal was a new pier completed in 1916, equipped in a modern manner, and the plaintiff company was its first occupant as a tenant. It was located at the foot of 39th Street in the Borough of Brooklyn, adjoining the municipal ferry and parallel with and north of seven piers numbered from 1 to 7 inclusive already owned and operated by the Bush Terminal Company. It was 625 feet long and 60 feet wide and was a one-sided pier, that is a pier at which vessels could dock on but one side, and a single deck pier. It was 206 feet from Pier 7, one half of which space was available for docking on the south side, the north side being occupied by the ferry slips. The other piers were all much longer than Pier 8 and were double or more than double the width and furnished berthing space for two large and in some instances three average vessels on each side. Pier 8 did not furnish berthing space for more than one vessel at a time unless they were smaller than the average of the vessels entering and leaving this port and requiring this character of docking facilities.

XI

The demand for piers in New York Harbor had been on the increase for some time previous to 1918 and continued to increase very materially during 1918 and 1919 until at times the demand exceeded the supply. By reason of these conditions the rates charged and paid for the berthing of vessels increased and particularly so during 1918 and 1919 and to such an extent that during those years there was but

little if any stability in that respect and in some instances the necessities of the situation resulted in the charging and paying of rates several times larger than those charged and paid for the same accommodations before the unusual activities in shipping due to the World War.

XII

A pier in New York Harbor at which berthing space was rented for the use of vessels could be so operated that berthing rentals accrued for three-fourths of the time.

XIII

The United States was in possession of Pier #8 for 454 days, and the unexpired term of plaintiff's lease after the surrender of the pier to the Bush Terminal Company was 153 days. The reasonable value of the use of the pier during that time was $200 per day on the basis of a full time valuation.

CONCLUSION OF LAW

Upon the facts found the court concludes as matter of law that the plaintiff's petition should be dismissed for want of jurisdiction and it is so ordered with judgment against the plaintiff for cost of printing the record, to be taxed by the clerk.

[fol. 23] IN THE COURT OF CLAIMS

OPINION

DOWNEY, Judge, delivered the opinion of the court:

The plaintiff sues to recover the reasonable value of the use of Pier 8 of the Bush Terminal from midnight of January 31, 1918, until midnight of September 30, 1919. The Bush Terminal Company of New York owned and operated what is known as the Bush Terminal, in the Borough of Brooklyn, and which for the most part consisted of a series of eight piers, numbered from one to eight, inclusive, and more than a hundred warehouses, with 30 miles of railroad tracks extending from main-line railroads to said warehouses and onto said piers.

In September of 1916 the plaintiff company had entered into a lease with the Bush Terminal Company for the use of Pier 8 for the period of three years, beginning on the first day of October, 1916, at an annual rental of $5,000, and was in possession of said pier under said lease from October 1, 1916, until August 24, 1917, from which last-named time until February 11, 1919, the pier was in possession of John S. Sheppard, Jr., a temporary receiver for the

business of the plaintiff company appointed by the judge of the District Court of the United States for the Southern District of New York.

On December 31, 1917, by an order of the Secretary of War of that date, the United States took possession of the Bush Terminal properties above referred to, and on the 3d of January, 1918 the Acting Quartermaster General served formal notice on the Bush Terminal Company that it had requisitioned the Bush Terminal properties described in an attached schedule, which included all of the said Bush Terminal properties in the Borough of Brooklyn, consisting of piers, warehouses, and appurtenant railroad facilities.

On the 14th day of January, 1918, by a notice dated January 1, 1918, but served on said January 14, the receiver of the plaintiff company was notified that by authority of the President of the United States the Bush Terminal had been requisitioned for the use of the embarkation service of the United States Army, and possession thereof had passed to the United States, and that it was necessary that the Government have full possession of these premises at the earliest date possible, and he was requested to communicate with the officer of the United States Army in charge of the division of docks, wharves, and terminals and make arrangements for the vacation of the pier.

The lease, the order of the Secretary of War, the notice to the Bush Terminal Company, and the notice to the receiver of the plaintiff company appear in full in the findings, and may be referred to herein to the extent necessary in the discussion of the questions involved without quoting.

The receiver of the plaintiff company had paid to the Bush Terminal Company the rental provided in the lease for the month of January, 1918, and, there being certain commitments involving the use of the dock during that month for the purpose of unloading a vessel, it was agreed between the receiver and the officer in charge of docks, wharves, and terminals that the receiver should vacate and surrender possession of Pier 8 to the United States at midnight of January 31, 1918, which he did. Such revenues as accrued from the use of the pier during the month of January were retained by the receiver, but [fol. 24] the unloading of the vessel which had docked at Pier 8 during the latter part of January, not having been completed when the pier was turned over to the possession of the United States, the receiver, by virtue of an arrangement between him and the officer in charge of docks, collected the portion of the revenues arising from such use of the pier during the month of February, together with revenues arising during the month of January, and paid over to the United States such revenues accruing during February. The pier was vacated by the United States and surrendered to the Bush Terminal Company at midnight of April 30, 1919.

When the Bush Terminal properties were thus requisitioned by the United States, a part thereof were in the possession of the Bush Terminal Company unleased, but many parts thereof, including piers and warehouses and pier and warehouse space, were in the possession of tenants of the Bush Terminal Company. A board of

ppraisers was appointed to determine the compensation to be paid y the United States to the Bush Terminal Co. for the use of he Bush Terminal properties, and they made a report, which is set ut in the findings, in which they determined not only the compen-ation to be paid to the Bush Terminal Co. for the portions of the roperties not under lease, but also determined by items the pay-ents to be made to the Bush Terminal Company on account of the veral items in the possession of tenants at the time the properties ere taken over, some of whom for various times were permitted remain in possession, in connection with which they determined he rental value of Pier 8 to be $2,325 per month, and as a part f the compensation paid the Bush Terminal Company by the nited States for the use of its properties during the period of overnment occupancy that company was paid for Pier 8 at said ate of $2,325 per month. Subsequent to January of 1918 neither he receiver for the plaintiff company nor the plaintiff company self paid any rent for said pier.

Soon after the taking over of the terminal properties by the nited States the United States paid to the Bush Terminal Com-any $1,000,000 to be applied upon the compensation for the use of he properties taken, or upon the purchase price of the properties in he event that the United States should determine prior to July 1, 918, to acquire absolute title thereto, as indicated in the instrument f appropriation, and in the determination by the board of ap-raisers as to the compensation due the Bush Terminal Company or the first year of the occupancy of its properties by the United tates this $1,000,000 was credited as an advance payment upon he compensation determined, and the award made by this board of ppraisers was accepted by the Bush Terminal Company and pay-ent thereunder authorized by the Secretary of War, and made. his award as made and accepted by the Bush Terminal Company overed the use by the United States of all of the properties taken. hether in the possession of the Bush Terminal Company unleased r in the possession of tenants. When the United States surren-ered the possession of Pier 8 to the Bush Terminal Company, that ompany executed to the United States a release "from any and all laims from suits, debts, obligations, and liabilities of whatsoever ind and nature which may arise or may have arisen by reason of ccupation of said premises by the United States," said release ap-fol. 25] pearing in full in the findings. There are other facts per-nent to the questions involved which are set out in the findings and eference may be made thereto as occasion requires.

Counsel on both sides of the case devote their attention largely to discussion of the question of fact as to just compensation in addi-ion to which the defendant raises a question as to the jurisdiction f the court, predicated upon the statute involved.

The jurisdictional question raised is necessarily for determination nd naturally has priority; but assuming it determined that this ourt has jurisdiction in this respect, it does not follow that only he question as to the amount of compensation remains, for, preced-ng that question, there is for determination the basic question as to

whether there is any right of recovery in the plaintiff, and upon determination of that question another jurisdictional question may arise.

Upon the jurisdictional question raised it is, of course, to be conceded that if the case is under section 10 of the Lever Act, 40 Stat. 279, as contended, this court is without jurisdiction. United States v. Pfistch, 256 U. S. 547. But we do not so regard it, and neither has the plaintiff so predicated its case. The plaintiff declares upon a requisitioning of its pier, the implied contract arising therefrom, and the jurisdiction of this court under section 145 of the Judicial Code.

The general order under which the United States took possession of the properties of the Bush Terminal Company declared that such action was taken pursuant to the authority vested in the President by the act of Congress approved August 29, 1916, 39 Stat. 645, and section 10 of the Lever Act, and the character of the properties taken indicates clearly the reason for the reference to the two acts as the authority for the taking.

The act of August 29, 1916, authorized the taking of "any system or systems of transportation or any part thereof and to utilize the same to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment," etc., while section 10 of the Lever Act applied, so far at least as this case is concerned, to "storage facilities." The properties of the Bush Terminal which were taken consisted of piers in New York Harbor, railroad tracks leading thereto and thereon, and warehouses. It seems apparent therefore that the recital of the two acts was because of the application of one to the piers as parts of a transportation system and the other to the warehouses as "storage facilities," and it is a matter of common knowledge that these piers were in fact very largely used "for the transfer or transportation of troops, war materials, and equipment" during the World War. They and the railroad tracks appurtenant thereto were "transportation" and not "storage" facilities, and this conclusion determines the jurisdictional question raised.

Assuming the correctness of the conclusion, the case presented is one invovling a taking of property under authority of the act of August 29, 1916, which contains no provisions as to compensation such as are found in section 10 of the Lever Act, with a right to recover just compensation as upon an implied contract if upon the facts such an implication arises, and the jurisdiction of this court is, because of its jurisdiction under section 145 of the Judicial Code, of actions founded "upon any contracts, express or implied."

[fol. 26] In this view of the case we have for consideration the very important question whether under the facts found there was such a taking from the plaintiff of its property as gives rise to an implied promise to pay the plaintiff therefor, and upon this question, in view of the status of the plaintiff as a tenant, we are, so far as our researches have developed, without direct authority, although established fundamental principles seem applicable.

It appears that included in the Bush Terminal properties which were taken over by the United States there were eight piers, of which

No. 8, the one here involved, was the last built and much smaller than the others, and a considerable number of large warehouses, all of such extent that aside from the parts of these properties which were in possession of the Bush Terminal Company and not under lease and which, judged by rental value, we may infer from the record constituted more than half of the properties, there were approximately forty tenants occupying such parts of the properties as to command a rental of more than sixty thousand dollars per month. It was against all of these vast properties collectively that the United States proceeded under the authority vested in the President, and its procedure with reference thereto was against the Bush Terminal Company.

Its action against the plaintiff was not by way of a commandeering order against it but was a notice to it that "the Bush Terminal has this day been requisitioned for the use of the embarkation service of the United States Army," followed by a suggestion as to a desire not to inconvenience present occupants and a direction as to arrangements for the consummation of the vacation of the pier. And the pier in question was a part of the "Bush Terminal" which it was said had been requisitioned. The service of the notice was acknowledged by the receiver of the plaintiff company, who had paid rent for the pier for the month of January, and very amicable negotiations between him and the officer in charge, because of commitments for the use of the dock during that month, resulted in an agreement that the receiver might retain possession until January 31st and turn the pier over at midnight of that day, which he did without objection or protest and from that time on paid no rent.

When the the United States commandeered the Bush Terminal, including Pier 8, and notified the plaintiff receiver of that fact and that he must arrange to vacate, the result of its action was to take the possession of the pier, which was then in the receiver and, in practical effect, to deprive the receiver of that leasehold interest therein which he then held and if a lease is property, which it must be conceded to be, and may therefore be the subject matter of a "taking," it is rather natural than otherwise to conclude that in this instance the United States "took" from the plaintiff's receiver a leasehold interest in the pier and must make just compensation to the plaintiff therefor. But this conclusion is one of natural matter of fact import rather than of legal derivation, since, as it seems to us, some of the elements of a "taking," out of which an implied contract to pay arises, are lacking.

It is not every actual taking or using of the property of another which constitutes such a "taking" as gives rise, coupled with the applicable provision of the fifth amendment, to the implied contract to pay which must be the basis of a recovery in this court.

[fol. 27] In Tempel v. United States, 248 U. S. 121, the United States assumed that it had the right to submerge and navigate over and further dredge the plaintiff's land, which facts, it was held, precluded the implication of a promise to pay, although the United States did in fact dredge and submerge and in fact take plaintiff's land.

In Hill v. United States, 149 U. S. 573, the United States asserted a right to the use of the land in question as against the plaintiff or any other person, and it was held that the action should have been dismissed for want of jurisdiction. And this case was said to be governed by Langford's case, 101 U. S. 341, in which case the United States, in taking possession of the property claimed by the plaintiff, asserted its own title and it was held that no implied contract to pay could arise.

Since these cases and others along the same line, touch necessarily, as we construe them, upon a requisite element of an implied contract, it is not inappropriate, as reflecting historically the jurisdiction of this court and the later holdings, after its enlargement, to say that when the Langford case was decided this court's jurisdiction, defined by sec. 1059, R. S., was founded upon "any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied," and that by the act of March 3, 1887, 24 Stat. 505, which became practically section 145 of the Judicial Code, there was added to its jurisdiction "claims founded upon the Constitution of the United States." But notwithstanding this addition and the provision of the fifth amendment as to just compensation, and the suggestion in a dissenting opinion in the Hill case that, by reason of the provisions of that act, the jurisdiction of this court was as of an action founded on the Constitution, the jurisdiction of this court has consistently since that time, in this class of cases, been held to be a jurisdiction of cases founded upon an implied contract. This is material, since if the facts do not justify the implication of a legal contract to pay, this court is without jurisdiction.

The cases cited above are illustrative of the fatality of the absence of any necessary element of an implied contract to pay, the absence in those cases of any intention to take the property of the claimants even though it was actually taken. An intention to take was wholly inconsistent with the asserted right. Such an intention may, of course, be implied rather than expressed as, for example, in the cases with which we have had to do where the United States by the erection of dams in streams has permanently overflowed lands and the intention to take is to be inferred because it was the necessary and easily to be ascertained result of the act done and must have been anticipated, but likewise may the absence of any essential element of an implied contract be a matter of justified inference from the circumstances of the case. In Horstman Company and Natron Soda Company v. United States, 257 U. S. 138 at 146, referring to the necessity for the implication of a contract to pay in order to bind the Government, it is said, "but the circumstances may rebut that implication." See Ball Engineering Co. v. White & Co., 250 U. S. 46-57.

Consideration of this case is necessarily a reminder of the well-known and urgent governmental needs at the time involved. They were the needs of a great emergency. Ships were being procured for the transportation of troops and supplies, but adequate and conven-[fol. 28] ient embarkation facilities were necessary, and they were best to be had by utilizing the great Bush Terminal. Obstacles to a renting presented themselves, and under the authority vested in the

President a general commandeering order was issued by the Secretary of War, taking over for governmental purposes in connection with the transportation of troops and supplies this great system of docks and warehouses, notice to that effect being served on the Bush Terminal Company. Many docks and parts of docks, warehouses, and parts of warehouses were in the possession of tenants.

Could it be conceived that in these circumstances the Government must meet its emergency by requisitioning berthing space for a ship from this tenant and for another ship from another tenant, and warehouse space from various tenants. Rather did it do the natural, the efficient, the necessary thing. It requisitioned the Bush Terminal from its owner, the Bush Terminal Company. And it took it not simply for temporary use but for such use, coupled with a right to determine within a given time whether it would take over the title thereto.

It served no instrument of requisition, either in form or effect, upon the plaintiff, but, on the contrary, it notified the plaintiff that it had requisitioned the Bush Terminal and that possession thereof had passed to the United States, followed by suggestions as to the vacation of Pier 8, and later by negotiations resulting in the fixing, by agreement, of a time when the plaintiff's receiver would vacate, which he did at the time agreed upon without objection or protest.

It would seem thus that even though the action of the United States served to deprive the plaintiff of the possession of the pier and to take over a use thereof which was the equivalent of that enjoyed by the plaintiff under its lease, there was no action directed against the plaintiff in this respect, but the United States proceeded, so far as the plaintiff was concerned, upon the theory that it had already acquired, by virtue of its requisitioning of the Bush Terminal from the Bush Terminal Company, the right to the use of Pier 8 in common with all the other properties taken. And if in fact the United States thus invaded the rights of the plaintiff, is it not, as was said in the Kelly case, 243 U. S. 328, even though the facts and the application of the principal are widely different, "the character of the invasion * * * that determines whether it is a taking."

Had the United States desired to acquire the use of Pier 8 only, and had it known that it was in the possession of the plaintiff as a tenant, it might have commandeered the plaintiff's leasehold and placed itself practically in the position of a sublessee, with liability to pay rent as just compensation, and the result accomplished, so far as the possession and use of the pier are concerned, would have been the same, but it is not the result alone which determines liability in this class of cases. The result, which is in fact the damage inflicted, must have followed from an invasion of plaintiff's rights of such a character and under such circumstances as necessarily imply an intention to acquire some property right from the plaintiff and a promise to pay the plaintiff therefor. The mere removal of the plaintiff as an obstacle to the enjoyment of a right otherwise acquired does not measure up to liability upon an implied contract, even though the result, so far as the plaintiff is concerned, may have been the same.

[fol. 29] And is it reasonable to assume, as bearing upon the ques-

tion of intention as a necessary element of an implied contract, that the United States, having specifically requisitioned the Bush Terminal from the Bush Terminal Company intended to duplicate its procedure in that respect as to each of forty or more tenants by separately requisitioning again from them? If it be said that it was the tenants who held the right to the use of the several portions of these properties embraced in their leases and not the Bush Terminal Company, and that those interests in its properties which it had committed for a time to others could not be taken from that company, such a condition, if true, could not determine the action of the United States or put it in the position of having done something which it did not do. If it did not in fact take from the plaintiff such right of occupancy as it held in Pier 8 under such circumstances as justify the implication of a contract to pay the plaintiff therefor, it is immaterial how it took or what possible wrong it may have inflicted on the plaintiff by the taking, for unless, so far as this case is concerned, we can raise up an implied contract as between the United States and this plaintiff, there is nothing for our consideration.

In Johnson's case, 2 Ct. Clms. 391 and 4 Ct. Clms. 248, it is held in substance that when the United States occupies the property of another the use and occupation are private property taken for public use, and that the Government is deemed to have entered as a tenant under an implied contract of leasing, whereof the just compensation secured by the Constitution is the rent, and in Loyd v. Hough, 1 How. 541, discussing an action in assumpsit for rent necessarily to be founded on a contract, express or implied, it is said that the action will not lie when the possession has been acquired under a different title or where it was tortious, and, in a case cited, it is said that the action for use and occupation is founded on privity of contract. There was not attempt in the instant case to acquire possession under the plaintiff's title. "Such relationship (landlord and tenant) will never be implied when the acts and conduct of the parties are inconsistent with its existence." 142 U. S. 407.

It may be suggested further that no contract to pay can be implied as against the United States because of a taking of property unless the taking was authorjed. In the Tempel case, supra, it is said in a footnote that "Nowhere does it appear that the Secretary of War authorized the taking of the property involved in the suit." In the Langford case, supra, reference is had to the enforcement of "valid contracts" which, it is said, could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contracts. See also United States v. North American Co., 253 U. S. 330-333. Aside from preceding suggestions as to procedure in this matter, it does not appear that anyone having to do with the transaction, so far as the plaintiff is concerned, had any authority to requisition anything from it. The officer serving as General Superintendent of the Army Transport Service was notified by Gen. Goethals, Acting Quartermaster General, that an order had been

ed by the President taking possession and assuming control of Bush Terminal and directing that he (the Superintendent of Transport Service) "in conformity with said order" should take session of and assume control of the premises. Subsequent pro-
l. 30] ceedings were by subordinates of the Superintendent of the nsport Service and if otherwise than in compliance with instruc-s to proceed under the general order against the Bush Terminal, hey were not, they were without authority. If, therefore, there any authorized taking of Pier 8 from the plaintiff, using the d "taking" in the sense in which we use it as an element of an plied contract to pay the plaintiff therefor, it must have been be-se the taking of the whole from the owner necessarily included, as an additional and separate liability, the taking of a part m a tenant, even though there may have been no knowledge or ent as to the tenant's interest. We can not assent to the theory t if the President for war purposes took from the owner the use a large office building, occupied by many tenants, such a taking ame the basis of an additional implied contract as between the ited States and each tenant.

t is to be observed that authorities discussing the rights of tenants en made parties defendant in condemnation proceedings are not point. We assume that it is not necessary to discuss essential erence between proceedings in condemnation and cases of this d.

We suggest a further question which, in view of the conclusion eady reached, need not be discussed in detail or, in fact, decided, that is whether the taking over of the Bush Terminal from the ner did not terminate the leases of the tenants. The taking was war purposes, authorized under the war power of the President, n though also by statute, to which power the rights of parties ler private contracts must be subordinated. In Gates v. Goodloe, U. S. 612, the question decided went only to the liability of ees to pay rent, but the authorities cited go far toward sustaining conclusion that in such event private contracts inconsistent with exercise of a sovereign right are dissolved.

t is now very much in point to refer to the Omnia Commercial npany, Inc., v. The United States, decided by the Supreme Court appeal from this court April 9, 1923, and since our expressions o the merits of this case were in type before the opinion in the nia case reached us, we do not attempt references at appropriate nts in this opinion to valuable and pertinent suggestions found he comprehensive discussion of a similar question in the Omnia e but content ourselves with a general reference thereto, confi-t that the pertinent points will readily find their application and erentially, if not directly, lend approval to a part at least of what have said and sustain the conclusion reached.

Our conclusion must be that the circumstances of the case do not tify the implication of a contract on the part of the United States pay the plaintiff for the use of the pier in question, and since jurisdiction to award compensation is dependent upon the as-

certainment of an implied contract, and damages may not be awarded on any other basis, it follows that, in accordance with the rulings of the Supreme Court as to proper procedure in such circumstances, the plaintiff's petition must be dismissed for want of jurisdiction.

Graham, Judge; Hay, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

[fol. 31] IN THE COURT OF CLAIMS

V. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the Sixteenth day of April, A. D., 1923, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Five hundred and thirty-nine dollars and sixty-three cents ($539.63), the cost of printing the record in this court, to be collected by the clerk, as provided by law.

IN THE COURT OF CLAIMS

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On May 17, 1923, the plaintiff filed a motion for a new trial. On May 28, 1923, the court overruled said motion and handed down the following memorandum:

[fol. 32] IN THE COURT OF CLAIMS

VII. MEMORANDUM DENYING MOTION FOR NEW TRIAL—Entered May 28, 1923

Plaintiff files a lengthy motion for a new trial, predicated upon alleged errors in the findings of fact. While such motions in this court are ordinarily treated as motions to amend findings or for additional findings of fact, they may under the rules be properly denominated motions for a new trial. To the extent, however, that they are addressed to the findings or when addressed only to the findings they are regarded as motions having for their purpose the cor-

ction of errors in, or making proper additions to the findings of ct, and not as necessarily reopening the case unless the changes in, additions to, the findings so require.

It is to be said at this point that the motion filed raises no question as to the correctness of the conclusion of the court. In other ords there is no error of law assigned.

That the situation presented as to the findings may be correctly nderstood, it is deemed advisable that some expression with refernce thereto be given.

The first point of objection to the findings refers to the last paraaph of Finding I and is upon the ground that the court erroneously und that "from August 24, 1917, to February 11, 1919, the period volved herein, the business of the plaintiff was in the hands of hn S. Shepherd, jr., as temporary receiver," etc. There is an aparent error in this language by reason of the omission of one word om the print, but it is a wholly immaterial matter. The period volved clearly appears from all the findings as well as the period of e receivership, and when before the words "the period involved erein," the word "of" is inserted, the error, typographical in its ature, is corrected. The court will direct the insertion of the word f" in the fidings as originally made and filed.

For its second point the plaintiff alleges error in Finding VI in at after setting out the letter of date January 1, 1918, from the ficer in charge of the division of docks, wharves, and terminals, to laintiff's receiver, there was failure to also set out a letter dated nuary 16, from the receiver to said officer, together with his reply ereto.

It is noted first that the matter referred to does not appear in inding VI. It does appear in Finding V, and we will treat it as the reference to the fiding were correctly stated.

It would be sufficient reason if there were none other for rejecting is paragraph of plaintiff's motion upon the ground that the matter ow sought to be incorporated in the findings and made the basis of ror by reason of its omission was not requested by the plaintiff its original request for findings of fact.

ol. 33] This is material since it has its foundation in a rule of e Supreme Court with reference to practice in this court. Rule V of the Supreme Court requires the making and filing of findings fact in this court and is followed by Rule V with reference to the ties of parties, providing that—

"In every such case, each party, at such time before trial, and in ch form as the court may prescribe, shall submit to it a request to nd all the facts which the party considers proven and deems maial to the due presentation of the case in the findings of fact."

But, aside from that question, the letter sought to be incorporated, nd the officer's reply thereto, are wholly immaterial. The comunication set out was the formal notice given to the plaintiff that e United States had taken over the Bush Terminal. The letter ught to be incorporated refers simply to some prospective arrangeents as between the receiver and the officer which had been dis-

cussed by them and which had reference to some commitments made for the use of the dock during the month of January. The final paragraph of Finding V, stating the situation in general terms, incorporates everything with reference thereto which is in anywise material.

For its third ground of objection the plaintiff alleges error in that it is stated in Finding V that "a board of appraisers was appointed by the Secretary of War to determine proper compensation to be paid the Terminal Company for the use of the properties, and also to determine the value of the properties in the event the United States should conclude to acquire title. Said board of appraisers made an award as follows:", and the error is alleged to be in the fact that the board of appraisers was appointed not only to determine the proper compensation to be paid to the Bush Terminal Company but also the proper compensation to be paid to the tenants. Again the plaintiff is in error in its averment in this respect since the statement quoted to which objection is made is not found in Finding V. But it is in Finding VI, and again we treat it as if the finding reference were correctly given.

In support of the allegation of error in this respect reference is made to certain exhibits in the record, but if the facts were material as to the authority of the board the references are of doubtful character as to their probative value. Upon the whole question as to the duties assigned to this board the record is unsatisfactory, and it is particularly noticeable that it does not disclose at all the official order constituting this board and the duties asigned to it. Plaintiff's first reference is to a communication by the board itself under date of April 26, 1918, to the general superintendent of the Army Transport Service at New York, in which it is stated that "the board has been ordered to settle all damage to tenants," etc., but by whom or by what authority is not shown. The second reference in support of plaintiff's contention is to an opinion of the Judge Advocate General. This opinion, it may be said, is not competent as proving any fact; there is no material fact stated there, in so far as the plaintiff is concerned, and besides it is a public document, to which reference may be made if desired without incorporation in the findings. The next reference is to a communication from Colonel Dalton of the Quartermaster Corps to plaintiff's receiver, dated May 1, in which notice is given that claims for damage must be presented without delay to the board of appraisers, etc. The next reference is to an acknowl- [fol. 34] edgment by the board of appraisers of the receipt from the plaintiff's receiver of a claim by reason of the taking over of Pier 8, and the final reference is to a memorandum made by the plaintiff's receiver himself with reference to a conference he had had with a member of the board of appraisers.

These references do indicate that by some one at some time this board of appraisers had been directed to consider the claims of tenants, or that the board of appraisers had construed such claims to be within its jurisdiction, and the court was not unmindful of these features of the record when the findings of fact were made. It acted deliberately in omitting such matter from the findings,

d in that respect its former action still seems to have been entirely rrect.

The situation is peculiar and perhaps deserves some attention. It first to be said that none of this matter now sought to be incor-rated in the findings was asked for by the plaintiff in its original quests.

Assuming that the references of plaintiff to parts of the record ed in support of its motion are to be taken as in support of its legation that the court was in error in stating that this board of praisers was appointed to determine the compensation to be paid the Bush Terminal and not also stating that it was to determine e compensation to be paid to the tenants of the Bush Terminal Co., is to be noted that the plaintiff concedes, in its brief in this court, e correctness of the court's statement, so far as it goes, with ref-ence to the appointment of this board of appraisers, for in its ief it says "there appears in the record a copy of an 'award to ush Terminal' and its acceptance by the Bush Terminal. This as made by a board of appraisers ordered by the War Department make an offer of compensation to the Bush Terminal which if cepted would avoid litigation between the Bush Terminal and the overnment. It was offered to supplement the testimony on the bject of what the Government had paid to the Bush Terminal." here is nothing in the findings as made indicating that the incor-ration of this award to the Bush Terminal made by this board appraisers was not for the purpose stated by the plaintiff itself. here was an apparent reason why the findings should show the tion taken by the United States with reference to the adjustment ith the Bush Terminal for the occupancy of all of these proper-es, and the findings show as a quite material matter in that respect at adjustment was made with the Bush Terminal and payment ade in accordance with the award made by this board of appraisers.

But does it follow that it was incumbent on the court to go into e question of the authority of this board of appraisers to consider e claims of tenants? The authority, if any, only inferentially ppears, but there are more forcible reasons for questioning whether e action, if any such action was taken by this board of appraisers ith reference to the claims of tenants, need enter into these findings. nd in that connection it is also to be said that there was *on* omission rom the findings of certain facts shown by the record with refer-nce to the claim of this plaintiff and which very peculiarly plaintiff oes not now seek to have incorporated in the findings. It did not riginally and it does not now ask to have the findings show that its eceiver did in fact file a claim with this board of appraisers and that [fol. 35] this claim was disallowed. The fact in this respect is that pon argument of this case the plaintiff sought to and so far as it ould did repudiate the claim filed by the receiver with this board. ts counsel then stated to the court that the receiver did not properly nderstand the situation when he filed that claim and that plaintiff hould not be bound thereby.

But there is a broader and a better reason why any such procedure

as is now referred to was not for incorporation in the findings, and it is quite apparent that the plaintiff's position now taken with reference thereto is inconsistent with the theory upon which it prosecuted its action in this court and to which the court gave its approval.

The question was raised upon the original presentation of this case as to whether this court had jurisdiction and that question as presented depended upon the question as to whether the taking was under section 10 of the Lever Act or under the act of August 29, 1916. The plaintiff's theory presented in its petition and thereafter was that there was a requisitioning under the last-named act and that the jurisdiction of this court was under section 145 of the Judicial Code. We had no doubt as to the correctness of this theory.

It ought not to be necessary to call attention again to the different procedure necessarily following action of the Government under these two statutory provisions. The act of August 29, 1916, simply authorized the President to requisition transportation facilities and, making no provision with reference to the fixing of compensation therefor, the remedy was necessarily upon an implied contract to make just compensation with jurisdiction in this court predicated upon section 145. Under section 10 of the Lever Act there were specific provisions as to the method of determining compensation. It provided that the President should fix the compensation, and that, if not satisfactory to the person entitled to receive the same, he should be paid 75 per cent thereof with his right of action following. If the plaintiff now regards it as material to endow this board of appraisers with authority to fix compensation of tenants as the duly authorized representative of the President and the action taken by that board in that respect, if it did in fact fix compensation to be paid tenants, is material as tending to determine the nature of the taking, and whether under section 10 of the Lever Act or the act of August 29, 1916, plaintiff's position would then tend to support the theory that the taking was in fact under the Lever Act and as stated in the original opinion in this matter, it is, of course, beyond question that if the procedure were under that act this court is without jurisdiction.

But we are inclined to think rather that the plaintiff is now, through some misapprehension, making some contentions which are not to be treated as affecting the merits of the case in any degree whatever, and that there is no good reason assigned why the court was in error in any respect, except as to the quite immaterial matter first mentioned, correction of which is ordered, as above stated.

If the proceeding herein was under section 10 of the Lever Act, the plaintiff must fail in this court because of lack of jurisdiction. We have already adjudged that its action should be dismissed because, though upon another ground, we are without jurisdiction.

The plaintiff's motion is overruled.

[fol. 36] IN THE COURT OF CLAIMS

VIII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed June 12, 1923

Now comes the complainant, on this 8th day of June, 1923, by its attorneys Almy Van Gordon and Evans, and applies to this Honorable Court praying for the allowance of an appeal according to the Statutes in such case made and provided, from the judgment rendered herein in favor of the defendant, dismissing the plaintiff's petition for want of jurisdiction, to the Supreme Court of the United States, according to law, and hereby gives notice of said appeal as herein applied for.

Almy, Van Gordon & Evans, Attorneys for Claimant.

[File endorsement omitted.]

IN THE COURT OF CLAIMS

IX. ORDER OF COURT ALLOWING PLAINTIFF'S APPEAL

It is ordered by the court that the plaintiff's application for appeal be and the same is allowed.

Entered June 18, 1923.

[fol. 37] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Downey, J.; of the judgment of the court; of the memorandum entered by the court on plaintiff's motion for a new trial; of the plaintiff's application for appeal and of the order of the court allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Nineteenth day of June, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 29,719. Court of Claims. Term No. 409. A. W. Duckett & Company, Inc., appellant, vs. The United States. Filed July 2nd, 1923. File No. 29,719.

SUBJECT INDEX.

List of Cases Referred to.

Supreme Court of the United States.

A. W. Duckett & Co. Inc.,
Appellant,

against

The United States,
Appellee.

OCTOBER TERM
1923
No. 409

APPELLANT'S BRIEF.

Statement.

This is an appeal from the judgment of the Court of Claims dismissing Duckett's petition for want of jurisdiction because, while the direct result of the action of the United States was to take possession, use and occupation of a pier in New York Harbor, the exclusive possession, use and occupation of which Duckett possessed by virtue of a three year lease of the premises, such action did not constitute such a "taking" of Duckett's property as implied an agreement to compensate it therefor.

Statement of Case.

(References are to pages in the Transcript of Record.)

A. W. Duckett & Co. Inc., a New York corporation (9) is engaged in the shipping business (10). During a portion of the period involved herein

Duckett was in the hands of an Equity Receiver (9). Since the receivership does not involve the questions at bar, hereafter both the corporation and the Receiver will be called "Duckett".

The Bush Terminal consists of a railroad, connecting main line railroads with many large warehouses and eight large piers in New York Harbor, all owned by the Bush Terminal Company (9).

The Bush Terminal Company leased Pier 8, Bush Terminal, to Duckett for the period October 1, 1916 to September 30, 1919 inclusive, (9, 3-8). Duckett entered the premises, possessed and operated the pier as part of its business until dispossessed by the United States in the manner hereinafter described (9, 12).

On December 31, 1917 the Secretary of War, by direction of the President, took possession of the Bush Terminal including Pier 8 (10). This action was taken under the authority of the Act of Congress, giving the President the power to requisition "systems of transportation" (Act of Congress, August 29, 1916; 39 Stat. 645) and of Section 10 of the Lever Act, (40 Stat. 276) authorizing the President to requisition "storage facilities for supplies connected with the common defense" (10).

The instrument of requisition was a proclamation of the Secretary of War addressed "To Whom It May Concern" and provided that "possession and control is hereby taken, by direction of the President, of the following described parts of a system of transportation, including storage facilities; that is to say, of all those portions of the Bush Terminal, docks and warehouse property described in Schedule 'A' and shown on the map, Schedule 'B' hereto annexed in the New York Harbor" which included Pier 8 (10). This proclamation distinctly stated that steps would

be promptly taken to ascertain and pay fair compensation for the temporary use of the premises (10).

On the same date that the proclamation was made the Acting Quartermaster General of the United States Army directed the General Superintendent of the Army Transport Service to take actual possession and control of the premises (11).

Under date of January 1, 1918, the Officer in Charge of the Division of Docks, Wharves and Terminals, in the Office of the General Superintendent of the Army Transport Service of the War Department, gave notice to Duckett that the Bush Terminal had been requisitioned for the use of the Embarkation Service of the United States Army and demanded that Duckett vacate Pier 8 at the earliest possible date (12).

Under dated of January 3, 1919 the Acting Quartermaster General notified the Bush Terminal Company of the action of the Secretary of War in the words of the proclamation (10).

When the Bush Terminal was requisitioned, a number of the piers and warehouses were in the possession of the Bush Terminal Company and a number, including Pier 8, were in the possession of lessees (13).

Thereafter, the Secretary of War appointed a Board of Appraisers to determine the proper compensation to be paid to the Bush Terminal Company for the use of the properties, to which proceeding Duckett was not a party (13).

Thereafter, the Board of Appraisers, advised the War Department that just compensation for the Bush Terminal Company for the portion of the Bush Terminal not under lease was $89,807.71 per month as of the date of the report; that this monthly compensation should be increased, from

time to time as the respective leases expired, by the amount reserved as rent in the expiring leases; that the rent of Pier 8 should be reduced from $5000 a month to $2325 per month by virtue of an agreement with the Bush Terminal Company, but to which Duckett was not a party, which provided that for the unexpired term of the Duckett lease the Government would pay the said rent to the Bush Terminal Company instead of to Duckett. This appraisal was accepted by the War Department and the Bush Terminal Company and payments were made in accordance therewith (13 and 14).

There were certain negotiations between the Officer in Charge of the Division of Docks, Wharves and Terminals and Duckett, as a consequence of which Duckett vacated and the United States took actual possession of Pier 8 at midnight, January 31, 1918, and remained in possession and control until midnight April 30, 1919 (15).

Duckett paid the Bush Terminal Company $5,000, the rent reserved in the lease, for the month of January, 1918. Thereafter the United States paid to the Bush Terminal Company $2325 per month to and including the month of April, 1919 (14 and 15).

At midnight, April 30, 1919, five months before the expiration of the term reserved in the Duckett lease, the United States surrendered the possession and control and gave the use and occupation of Pier 8, not to Duckett, from whom it had been taken, but to the Bush Terminal Company (15).

Duckett demanded possession, use and occupation of Pier 8 for the remainder of the term of the lease from Bush Terminal Company who, in turn, refused to put Duckett in possession unless and until Duckett paid to the Bush Terminal Com-

pany the difference between $5000 and $2325 per month during the period of the United States' occupation of the pier. Duckett refused to pay on the theory that since the Bush Terminal Company had covenanated for Duckett's quiet enjoyment of the use and occupation of the pier and since the sovereign of both had made it impossible for the Bush Terminal Company to perform its obligation during the period of the occupation of the United States, the rent was suspended during that occupation.

Thereupon the Bush Terminal Company leased the pier to others during the term of Duckett's lease at an increased rental (15, 16).

The reasonable value of the use and occupation of the pier on a basis of a full time valuation was $200 per day (17).

Argument.

The Court below states, in substance, that this is a case of first impression. It held that the practical effect of what was done, was to take from Duckett its property, to wit: a leasehold interest in Pier 8, Bush Terminal; that such "taking", however, lacked some of the elements of a "taking", that would imply a contract to pay therefor.

Courts have held that where the Government takes private property for public use, there arises an implied contract to pay just compensation therefor. (See Point I.)

But not every destruction or injury to property by Government agents constitutes such a "taking" (Tempel *vs.* U. S., 248 U. S. 121; Hill *vs.* U. S., 149 U. S. 593; Langford's case, 101 U. S. 341).

There must be a direct appropriation of the property as distinguished from consequential damages resulting from lawful Governmental ac-

tion. (Omnia Commercial Company *vs.* U. S., 261 U. S. 502; Monongahela Navigation Co. *vs.* U. S., 148 U. S. 312; Horstmann *vs.* U. S., 257 U. S. 138; Bedford *vs.* U. S., 192 U. S. 217; Kansas *vs.* Colorado, 206 U. S. 46; Gibson *vs.* U. S., 166 U. S. 269; Transportation Co. *vs.* Chicago, 99 U. S. 635).

The "taking" must be *ex contractu* and not *ex delicto.* (U. S. *vs.* North American Company, 253 U. S. 330, 333; Hijo *vs.* U. S., 194 U. S. 315, 323).

So, if the officer who takes the property acts without authority (Hove *vs.* U. S., 218 U. S. 322; Nahant *vs.* U. S., 136 Fed. 273; 153 Fed. 520; U. S. *vs.* Certain Lands, 145 Fed. 654), or if the officer acted upon the direct assertion that what he took was public property and not private property (Tempel *vs.* U. S., 248 U. S. 121; Hill *vs.* U. S., 149 U. S. 593; Schillinger *vs.* U. S., 115 U. S. 163; Langford's case, 101 U. S. 341) or if the officer when taking the property expressly denied any obligation upon the part of the government to pay (Ball Engineering Co. *vs.* White Co., 250 U. S. 46, 57) the taking is *ex delicto* and not *ex contractu* and there was, therefore, no implied promise to pay just compensation therefor.

There is no intimation in any case that there is no implied promise to pay just compensation where the authorized agent of the Government directly took private property, expressing an intention to pay, because, after the property was taken, an Army Officer sent a copy of the Presidential Proclamation, by which the property was taken, to the owner of the remainder who had long since parted with all right to the property taken.

To that extent this is a case of first impression.

To briefly indicate the errors which resulted in the decision in the Court below, we submit the

following analysis of the pertinent points of the opinion.

The elements of a "taking" out of which an implied contract to pay arises that are lacking, are said to be the following:

I. Lack of intention. There was a lack "of any intention to take the property of the claimant, even though it was actually taken". This lack of intention to take the property of the claimant is said to be demonstrated from the following facts:

(a) The Government "requisitioned the Bush Terminal from its owner, the Bush Terminal Company".

(b) The Government "served no instrument of requisition * * * either in form or effect upon the plaintiff * * *."

(c) The Government took the Bush Terminal "not simply for temporary use, but such use coupled with a right * * * to take over the title thereto".

(d) "There was no attempt in the instant case to acquire possession under plaintiff's title".

From the foregoing the opinion concludes that

(1) "The United States proceeded * * * * upon the theory that it had acquired, by virtue of its requisitioning the Bush Terminal from the Bush Terminal Company, the right to the use of Pier 8".

(2) Hence, there was no intention to take the property of the plaintiff.

II. The taking was *ex delicto*.

(1) "The General Superintendent of the Army Transport Service was notified by General Goethals, Acting Quartermaster General, that an

order had been issued by the President taking possession and control of the Bush Terminal".

(2) "General Goethals directed that, the General Superintendent, 'in conformity with said order', should take possession of and assume control of the premises".

(3) "Subsequent proceedings were by subordinates of the General Superintendent * * * and if otherwise than in compliance with instructions to proceed under the general order against the Bush Terminal, as they were not, they were without authority".

Hence the opinion concludes that

(1) No one having to do with the transaction, so far as the plaintiff is concerned, had any authority to requisition anything from it. Hence, if any person took anything from the plaintiff, it was taken *ex delicto* and not *ex contractu.*

III. The taking terminated the lease. The proposition is suggested that

(1) Since the Bush Terminal was taken over by the Government from the owner for war purposes authorized under the war power of the President, even though also by statute, such taking constituted a termination of Duckett's lease.

Hence, the opinion concludes that

(1) There could be no "taking" of that which was terminated, even though the termination was the direct consequence of the "taking".

We shall endeavor to point out both the contradictions of fact and errors of law in the foregoing opinion, which lie at the very foundation of the decision in their order in the following points:

POINT I.

The United States is conclusively presumed to have intended the natural consequences of its acts. If such acts were authorized and resulted in taking Duckett's property for public use, the United States impliedly promised to pay Duckett just compensation therefor.

The sole instrument of requisition was the President's proclamation, issued under direction, by the Secretary of War. From the moment that proclamation was signed and filed in the archives of the office of the Secretary of War, the United States had legal possession of the therein described portions of the Bush Terminal property. (Le Peyre *vs.* U. S., 84 U. S. 191). Whatever was done by Government officials after that time, to reduce that legal possession to actual possession that was within the limits of that proclamation, was the Act of the United States. If such acts resulted in the taking from Duckett of actual physical possession of this property for public use, even though such a result was not anticipated, or even though the United States acted under the belief that the private property taken belonged to someone else, the United States, nevertheless, promised by implication to pay Duckett just compensation therefor.

U. S. *vs.* Great Falls Mfg. Co., 112 U. S. 645.

Hollister *vs.* Benedict Mfg. Co., 113 U. S. 59.

U. S. *vs.* Palmer, 128 U. S. 262.

U. S. *vs.* Buffalo, etc. Co., 193 Fed. 905, Aff. 234 U. S. 228.

U. S. *vs.* Cress, Kelly, et al., 243 U. S. 316 at 328.

U. S. *vs.* Lynah, 188 U.S. 445.
U. S. *vs.* North American Transportation & Trading Co., 253 U. S. 330.
Langford *vs.* U. S., 101 U. S. 341.
Bigby *vs.* U. S., 188 U. S. 400.
U. S. *vs.* Honolulu Plantation Co., 122 Fed. 581, 585.

(a) *The United States did not requisition Pier 8, Bush Terminal from the Bush Terminal Company, but from Duckett.*

The controlling error of the Court below lies in the conclusion that what was taken was expressly taken from the Bush Terminal Company. This error undoubtedly arose from the confusion of the term "Bush Terminal" which is a generic term to cover the instrumentality as a whole with the then existing property rights of the Bush Terminal Company in that instrumentality. There is confusion between the Bush Terminal itself and the Bush Terminal Company, which, so far as the ownership of the property taken by the United States in question is concerned, are vastly different things.

The order of requisition was not addressed to the Bush Terminal Company, but "To Whom it May Concern" (10). The fee was not taken. What was taken was "possession and control" (10). The United States did not take possession of the property of the Bush Terminal Company in New York Harbor, but "of those portions of the Bush Terminal docks and warehouse property described in Schedule 'A' and shown on the map of Schedule 'B' hereto annexed in New York Harbor" (10).

The Bush Terminal Company is not mentioned by name or by necessary implication in the requisition. What the Government wanted was

the use and occupation of the described portions of the Bush Terminal property. It wanted that estate of the Bush Terminal Company or the estate of John Doe. For that purpose and to that end the Presidential proclamation was addressed "To Whom it May Concern". It concerned Duckett very much, since, so far as Pier 8 is concerned, the only estate taken by the requisition was the estate it owned. This the United States did not and could not take from the Bush Terminal Company. It is trite to say that one cannot take from a party that which it does not possess. The Bush Terminal Company did not have possession or control of this Pier or the right thereto. It follows that if the Government took everything that the Bush Terminal Company had it would not then have possession or control of Pier 8. It follows that the Government did not take possession and occupation from the Bush Terminal Company, because manifestly it could not take from the Bush Terminal Company that which it did not possess. The Government did take possession and control from the corporation that had it, to wit: Duckett, which would seem to demonstrate conclusively the fallacy lying at the basis of the decision of the Court of Claims in this case.

In the original opinion, however, much stress is laid on an erroneous conclusion of fact to the effect that "a Board of Appraisers was appointed to determine the compensation to be paid by the United States to the Bush Terminal *Company* (18-19) for the use of the Bush Terminal properties". "This award as made and accepted by the Bush Terminal Company covered the use by the United States of all of the properties taken, whether in the possession of the Bush Terminal Company, unleased, or in the possession of ten-

ants"(19). It was argued that these acts, done under the authority of the requisition addressed "To Whom it May Concern", manifested such an intention to take what it took from the Bush Terminal Company, whether that Company owned or possessed what it took or not, as to rebut the presumption of an implied promise to pay just compensation to the party "concerned" whose private property was directly and actually taken.

The acts of the Government officials in connection with this Board of Appraisers are matters of public record. This Court will take judicial notice of them.

The Board of Appraisers was first appointed by an order of January 9, 1918, which states merely that the Board is appointed "for the purpose of determining the rental value of the Bush Terminal" with no reference whatever as to whom compensation is to be paid. The amending order of November 2, 1918 on the other hand, expressly states that "the said Board is further authorized and directed to determine the value of the leasehold interest of each tenant of the said Bush Terminal Company, and, arrange, if practical, subject to approval, settlements with such tenants". Contrary to the conclusion drawn from the award to the Bush Terminal Company (13, 14) this award shows on its face that it does not include the use of all the properties taken. Provision is therein made for an increase in the monthly compensation to the Bush Terminal Company as the leases terminate from time to time.

When these matters were pointed out to the Court below, it took the position that they were quite immaterial and that the material matter in that respect was "that adjustment was made with the Bush Terminal (again confusing the Bush Terminal property with the Bush Terminal Com-

pany) and payment made in accordance with the award made by this Board of Appraisers" (28, 29).

As the matter now stands, therefore, so far as the acts of the Government are concerned, as manifesting its intention to take Duckett's pier not from Duckett who possessed it, but from the Bush Terminal Company who did not possess it, we have the following:

First, the proclamation directed "To Whom It May Concern"; second, an order of the Acting Quartermaster General to a subordinate officer to take possession of the property described as distinct from the interest of the Bush Terminal Company in that property so described; third, the acts of the officers under that order distinctly taking Duckett's property as such; fourth, the appointment of a Board of Appraisers, first to determine the rental value of the property and then specifically to determine the value of the leasehold interest of each tenant of the Bush Terminal Company in that property; fifth, the fact that this Board of Appraisers not only made awards to the Bush Terminal Company for the part of the property that it possessed, but awards to tenants situated in exactly the same position that Duckett was situated although that Board of Appraisers, under an agreement with the Bush Terminal Company agreed to pay rent for Pier 8 to the Bush Terminal Company and not to Duckett whose property the Government had taken. This very agreement recognizes the fact that it was Duckett's property that was taken, not that of the Bush Terminal Company. Can it be that an officer of the Government can make an agreement to pay one party for property taken, which concededly that party does not own and thus deprive the true and lawful owner of pay for it

under a Constitution which guarantees to citizens that private property shall not be taken without just compensation therefor?

To review the situation, neither the general requisition order of December 31, nor the order from the Quartermaster General to the General Superintendent of the Army Transport Service dated the same day, advising him of the requisition and instructing him "to take possession and control of the premises from this date" make any mention of the Bush Terminal Company whatsoever.

The original act or requisition, therefore, is entirely non-committal as to from whom the requisitioning was being done. When the Superintendent of the Army Transport Service came to take actual possession (as distinguished from legal possession which already passed by virtue of the requisition order) he proceeded both against the Bush Terminal Company and the lessee. To support the view of the Court of Claims he should merely have notified Bush Terminal Company of the requisition, demanded physical possession and left it to oust the tenants, but he did not do so—he proceeded similarly against Bush Terminal Company and the lessee—in fact if the dates on the notice are to govern, he proceeded first against the lessee (January 1st) and later against Bush Terminal Company (January 3rd). The next step was to award compensation and here again the United States had considered itself as having taken from the tenants, because it instructed the Board of Appraisers to determine the value of the leasehold interests and arrange settlement with the tenants. The Board of Appraisers accordingly made such determination and awarded compensation to the tenants and such compensation was actually paid in whole or in part to the tenants, except Duckett. It would seem difficult

to square this course of action on the part of the United States, with the intention, which the Court of Claims imputes to it, of dealing only with the Bush Terminal Company and ignoring the tenants.

Furthermore, does not the very nature of the thing taken show an intention to take and an actual taking from the tenants? The requisition order and subsequent notices read that "possession and control is taken". The intention to take no more than possession and control and not the fee is further shown by the additional statement in the requisition order that "steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use of the Government of the premises and also the fair compensation to be paid for the property in the event that the Government shall determine prior to July 1st, 1918, to acquire absolute title thereto".

"Possession and control" of the piers were in the tenants and not in the Bush Terminal Company. The latter had absolutely no right to possession and could not give it. The Court of Claims imputes an intention upon the part of the Government to take from the Bush Terminal Company something which the latter did not have. An intention to take must imply an intention to take from someone. The most natural presumption would seem to be that such intention is to take from the person who has the thing taken and not from someone who has it not.

It is said that "the mere removal of the plaintiff as an obstacle to the enjoyment of *a right otherwise acquired*, does not measure up to liability upon an implied contract."

Right here again the Court fell into fundamental error. It has, heretofore, been pointed out that what the Government took and all that it took was "possession and control". That "right" had

never been "acquired" by the Government from the Bush Terminal Company for the simple reason that the Bush Terminal Company had long since parted with that "right" and conferred it upon Duckett. The Government could not "acquire a right" from the Bush Terminal Company that the Company did not possess. If the Government took everything that the Bush Terminal Company had it would not have "possession and control" of Pier 8. Duckett alone had what the Government took, to wit: "possession and control". It follows that Duckett's possession and control was not "an obstacle" to the enjoyment of a right that the Government took from Bush Terminal Company, but was the very essence of the thing taken and to which the Bush Terminal Company had no right or title.

What the Government took from Duckett was an estate for years, a concrete estate in the real property itself as well recognized in the law as the estate in fee simple.

In the opinion below it is stated that "established fundamental principles seem applicable" to the case at bar. There is no fundamental difference between the estate in land for three years and the same estate for ninety-nine years, nor between such an estate and a life estate. All of them are property and as such cannot be taken for public use without paying just compensation to their owner even when each of them is held by a different owner and the Government takes them all. All of them carry a right to possession and control, use and occupation for their respective terms.

Nichols on Eminent Domain—pars. 118, 119;
Lewis on Eminent Domain—par 285;
Hare *vs.* Fort Smith R. R. Co., 104 Ark. 187;

Colcough *vs.* Nashville, etc. R. R. Co., 2 Head (Tenn.) 171;
Chiesa *vs.* City of Des Moines, 158 Iowa 343;
B. & O. R. R. Co. *vs.* Thompson, 10 Md. 76, 87;
Kernochan *vs.* N. Y. E. R. R. Co., 128 N. Y. 559;
Kearney *vs.* M. E. R. R. Co., 129 N. Y. 76;
R. R. Co. *vs.* Eby, 107 Pa. 166;
Dyer *vs.* Wightman, 66 La. 425;
Consolidated Ice Co. *vs.* Pa. R. R., 224 Pa. 487;
Stubbings *vs.* Village of Evanston, 136 Ill. 37;
Chicago R. R. Co. *vs.* Dresel, 110 Ill. 89;
Chicago R. R. Co. vs. Chicago Mech. Inst., 239 Ill. 197;
Town of Nahant *vs.* United States, 136 Fed. 273;
City of Chicago *vs.* Messler, 38 Fed. 302;
Ellis *vs.* Walsh, 7 Mass. 246;
Corrigan *vs.* Chicago, 144 Ill. 537;
Harrisburg vs. Crangle, 3 Wats. & S. 460 (S. C. of Pa.) 1842;
Gluck *vs.* Baltimore, 81 Md. 315;
Biddle *vs.* Hussman, 23 Mo. 597;
Gilligan *vs.* Providence, 11 R. I. 258;
Manufacturing Co. *vs.* Water Co., 84 So. Carolina 306.

In *Nichols on Eminent Domain,* paragraphs 118, 119, it is said,

> "* * * Accordingly whenever it appears that there has been a 'taking' of land within the meaning of the constitution, it is not merely the owner of the fee who is entitled to compensation, but every person holding an estate or interest in the subject matter of the

> taking which will be recognized by the courts as valid as against the owner of the fee, is equally protected by the constitution.
>
> * * * It is well settled that life tenants and lessees for years, or from year to year, holding under a valid devise, grant, or lease, have such an interest in the property as to be classified as 'owners' in the constitutional sense, and to be entitled to be compensated for the taking of their interest in the property, or to sue for damages or apply for an injunction when an unlawful injury to the property under color of eminent domain is inflicted or threatened, and the same rules apply to a sublessee as to a tenant holding a lease directly from the owner of the fee."

In *Kearney* v. *M. E. R. R. Co., supra,* it was held that the lessee for years of property which is damaged by the erection of an elevated railroad structure adjacent to it is entitled to recover for such damages.

In *Town of Nahant* v. *U. S., supra,* at page 278, the Circuit Court of Appeals for the First Circuit said:

> "The authorities, we think, sustain the text of Lewis on Eminent Domain in respect to what constitutes a taking of property—that, whenever lawful rights of an individual to the possession, use, or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is pro tanto taken."

In *Corrigan* v. *Chicago, supra,* the Court said,

> "That the tenant, as the owner of an estate for years, is guaranteed just compensation before his title can be divested under the power of eminent domain, is not questioned. * * * He holds and enjoys the estate granted

> subject to the exercise of the sovereign power to appropriate his land to a public use, upon making to him just compensation, and if he suffers loss or is deprived of his estate, he is provided with the same remedy that is given to all other owners, and holds his title subject to this right, as his landlord holds his title."

In *Kohl et al.* v. *United States, supra,* while it was admitted that the owner of a leasehold was entitled to an award in case leased land was condemned by the government, it was held that the lessee was not entitled to a separate trial of the issues involved, but that the award to be made to both lessor and lessee should be heard at once. On page 377, the Court said:

> "The second assignment of error is, that the Circuit Court refused the demand of the defendants below, now plaintiffs in error, for a separate trial of the value of their estate in the property. They were lessees of one of the parcels sought to be taken, and they demanded a separate trial of the value of their interest; but the court overruled their demand, and required that the jury should appraise the value of the lot or parcel, and that the lessee should in the same trial try the value of their leasehold estate therein."

In the Kohl case the fee was taken as well as the leasehold, while here only the use and occupation was taken by the government. Therefore, there was no occasion to fix the value of the fee.

Assume that Duckett had acquired a ground lease for ninety-nine years and had erected this Pier thereon at the cost of a million dollars, and the Government took Duckett's estate in that property without paying just compensation therefor by requisitioning it—either through ignorance, mistake or design,—from the owner of the reversion!

Assume that John Bush owned a life estate in the Bush Terminal property described in the schedule and shown on the map referred to and James Bush owned the remainder. Assume the Government requisitioned the use and occupation of the property described for three months, and sent a copy of the requisition proclamation to James Bush the remainderman instead of to John Bush the life tenant, can it be that the Government's mistake in sending the copy of the requisition proclamation or its ignorance of the true owner of the thing taken, deprives the true owner of the thing to be paid for under a Constitution that grants to a citizen that private property shall not be taken for public use without just compensation.

Assume that the Bush Terminal Company owned the property described in the Schedule and shown on the map, in fee simple, and the Equitable Life Assurance Society owned a first mortgage on the same property to secure a loan of 80% of its value. The legal title would then be in the Equitable Life Assurance Society and the Bush Terminal Company would be the owner of the equity of redemption. Assume then that the United States requisitioned the "absolute title" to the premises and sent the copy of the requisition proclamation to the Bush Terminal Company and notified the Equitable Life Assurance Society that he had requisitioned the property, can it be, that under such circumstances, the Government could pay the Bush Terminal Company just compensation for its equity of redemption and without compensation remove the Equitable Life Assurance Society as "an obstacle to the enjoyment of a right (absolute title) that the Government took from the Bush Terminal Company".

Fundamentally, there is no difference between the foregoing hypothetical cases and the case at bar.

What the Government took was possession and control, use and occupation. Can it be that the Government could take this property and refuse to pay just compensation to Duckett claiming that it took the property from the Bush Terminal Company and at the same time refuse to pay compensation to the Bush Terminal Company because what it took, it actually took from Duckett and not from the Bush Terminal Company.

Granting that the Court of Claims is right in its conclusion, that the Government acted upon the theory that it took possession and control of this property from the Bush Terminal Company, such fact would not rebut the presumption that the Government intended to pay the rightful owner of the property just compensation therefor.

Pumpelly *vs.* Green Bay Co., 13 Wall 177;
U. S. *vs.* Lynah, 188 U. S. 445;
U. S. *vs.* Cress, 243 U. S. 316;
U. S. *vs.* Welch, 217 U. S. 333;
Baker *vs.* State, 63 Misc. 549 (N. Y. Court of Claims);
Musanti *vs.* State, 131 N. Y. Supp. 20;
Brown *vs.* Powell, 25 Pa. 229.

In *Pumpelly* vs. *Green Bay Co., supra,* the plaintiff was the owner of land which was overflowed as a result of the erection of a dam built for public purposes under the Statute of Wisconsin. In that case the Government never acted directly against the claimants or their property, never negotiated with them nor in any way recognized their interests at the time of committing

their acts which the Court found amounted to a taking. The Government acted upon the theory that what it took, it took from others, yet the Court held that the Government must be conclusively presumed to have intended the actual consequences of its authorized acts and if those authorized acts result in taking the property of the plaintiff, whether it was intended to take that property or not, it was a taking which implied a promise, upon the part of the Government, to pay to the owner of the property actually taken, just compensation therefor. Note the following from the opinion of Mr. Justice Miller in that case:

> "It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which had received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect subject to total destruction without making any compensation, because in the narrowest sense of that word, it has not been taken for the public use."

In the case of *U. S.* vs. *Lynah, supra,* the lands of the plaintiff were overflowed and thereby rendered valueless as the result of the building by the United States of dams and dikes in the Savannah River for the purpose of improving its navigability. In this case the United States never acted directly against the plaintiff or his property, nego-

tiated with him or in any way recognized his interest at the time of committing the acts which the Court found amounted to a taking. Nevertheless, the Court held that the plaintiff's lands were actually taken for a public use within the meaning of the Fifth Amendment. Note the following from the opinion:—

> "Was there a taking? There was no condemnation proceeding instituted by the Government, no attempt in terms to take and appropriate the title. There was no adjudication that the fee had passed from the landowner to the Government, and if either of these be an essential element in the taking of lands, within the scope of the Fifth Amendment, there was no taking.
>
> "It is clear from these authorities that when the Government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment while the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested."

In the *United States* vs. *Cress, supra,* the United States in improving the navigability of the Cumberland River, by means of a lock and dam raised the water above the natural level so that lands of a non-navigable tributary, not normally invaded thereby, were subjected permanently to periodical overflows, substantially injuring though not destroying its value. In that case there was no direct action taken by the Government against the lands overflowed, yet the Court held that the authorized acts of the Government had naturally resulted in a partial taking of the property of the plaintiff and that these acts constitute such a taking as to imply a promise upon

the part of the United States to compensate the owner to the extent of the injury.

In the case of the *United States* v. *Welch, supra,* the plaintiff owned a strip of land which was permanently flooded by the construction of a dam. They also had a right of way over adjoining property, which right of way led through this flooded land and was the only means of access to other of their land which was not flooded. This right of way became valueless when the approach to it was lost. There was no direct action by the United States against the owner of the right of way to acquire the same. Yet the Court held that the natural consequences of the authorized acts of the Government had resulted in the destruction of this right of way and there was, therefore, an implied promise upon the part of the United States to pay just compensation therefor. Note the following from the opinion:—

> "A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits it must pay. But if it were only destroyed and ended a destruction for public purposes may as well be a taking as would be an appropriation for the same end."

In the case of *Baker* v. *The State, supra,* the State of New York appropriated certain property which at the time was under lease; the map and notice provided by law were duly served prior to the appropriation, on the owner of the fee but no map or notice was served on the tenant. Later there was a settlement made with the owner of the fee. There was no direct action taken by the State against the plaintiff. The State took what it did take under the claim that it was entitled to take it under the action against the owner of the

fee, yet the Court held that this action could not bar the tenant who was entitled to just compensation for his property which was taken by the State.

In the case of *Brown* v. *Powell, supra,* statutory authority was conferred to appropriate certain lands for public use. Acting under this authority the defendant secured a license from the owner of the fee and ignored the tenant in possession and took no action against the tenant whatever and did what it did under the contention that it had a right to do it under this license from the owner. Yet the Court held that what was in fact done under the authorized act was to take the property of the tenant and therefore the tenant was entitled to just compensation for the property actually taken.

(b) *The instrument served on Duckett was, while different in form, the same in effect as that served on the Bush Terminal Company.* In both cases it was a letter. The letter to the Bush Terminal Company was dated January 3, 1918, signed by an Army officer and recited *in haec verba* the Presidential proclamation on December 31, 1917. The letter to Duckett was dated January 1, 1918, was signed by an Army officer and recited the substance and effect of the Presidential proclamation. It also contained some suggestions about surrendering actual possession of the Pier. Both were notices to "persons concerned" advising them of the action that the Government had already taken. Neither of them were "instruments of requisition". The only instrument of requisition necessary or possible was the Presidential proclamation which was in being, full and complete and in complete legal operation before either letter was written. There was no more of a commandeering order against the Bush Terminal

Company than there was against Duckett. The commandeering order was addressed "To Whom it May Concern" because doubtless it concerned both the Bush Terminal Company, Duckett and other tenants. They were both notified of that order in the process of taking actual possession of the property, in different form to be sure, but to the same effect. Can it be that the form of the special notice that an army officer gives to the party whose property has already been requisitioned by the President determines whether or not the party whose private property is taken for public use may have pay therefor under a Constitution which grants to the citizen that private property shall not be taken for public use without just compensation?

The Court attempts to distinguish between the form of the notice sent to the Bush Terminal Company and that sent to Duckett and it is true that the wording is different. That sent to Bush Terminal Company dated January 3, 1918, is an exact copy of the general requisition order dated December 31, 1917 signed by the Secretary of War and reads "possession and control is hereby taken." That sent to Duckett is dated January 1, 1918 and is headed "Notice to Vacate" and reads "The Bush Terminal has this day been requisitioned—and possession thereof has passed to the United States". But they are both mere notices of requisition rather than actual requisition orders. The Court so considers the letter to Bush Terminal Company, for it says "a general commandeering order was issued—*notice* to that effect being served on the Bush Terminal Company." It could, in fact, be nothing else. The order of December 31, 1917 addressed "To Whom it May Concern" states that "possession and control is hereby taken". The letter to the ten-

ants dated January 1, 1918 states that "The Bush Terminal has this day been requisitioned." It seems obvious, therefore, that the requisition had already taken place before January 3, 1918, the date of the letter to Bush Terminal Company, so that such letter was a mere notice of requisition, even though it reads like a requisition order, and as a notice of requisition it is difficult to see any distinction between it and the notice to the tenants, the only difference being that the tenants' deals more specifically with the surrendering of actual physical possession of the pier.

(c) *The requisition did not authorize the Government to take title to the Bush Terminal property.* It is said in the opinion below that the Government took the temporary use and occupation of the Bush Terminal "coupled with a right to determine within a given time whether it would take over the title thereto". The facts found by the Court below directly contradict this conclusion. The proclamation specifically limits the thing taken to temporary possession and control. "Possession and control is hereby taken * * * to the end that they may be utilized for such time as may be required for the transportation of troops * * * and for such other purposes connected with the emergency as may be needful and desirable."

It is quite possible that the President may have contemplated the possibility of taking over the absolute title to the property some time within the next six months. For the proclamation provided that steps would be promptly taken to ascertain the fair compensation to be paid for the temporary use of the premises and the price to be paid for such property, *if within the next six months it should be decided to acquire absolute title thereto,* but that is very far from acquiring "ab-

solute title". There was nothing in the proclamation as issued that the right to take absolute title can be applied to. The Government had just as much right to acquire absolute title before that proclamation was issued as it had afterward. To acquire absolute title, however, the President would have to issue another proclamation. Certainly under a proclamation authorizing the taking of temporary use and occupation, any taking of absolute title would be unauthorized and tortious.

(d) *Not only was there an attempt to acquire possession under Duckett's title, but Duckett was the only party who had title to what the Government was expressly authorized to take and did take in the case at bar.* It is said in the opinion below "there was no attempt in the instant case to acquire possession under the plaintiff's title."

The United States took possession of plaintiff's property under a proclamation addressed "To Whom it May Concern". It took actual possession of plaintiff's property by notifying it that it had taken legal possession of it and ordering Duckett to vacate. If these acts do not constitute the taking of Duckett's property under its title, how would the United States go about such a taking? Certainly, if the United States were to take possession of Pier 8 by virtue of a claim that it was the property of the Bush Terminal Company, it would notify the Bush Terminal Company to vacate or to cause any party in possession under the Bush Terminal Company's right of possession, to vacate. This it did not do. It follows that the conclusion of the Court below, that there was no attempt in the instant case to acquire possession under the plaintiff's title, is not sustained by the facts upon which the opinion is expressly based.

Must the United States have accurate knowledge of the precise interests of all persons in a particular piece of property at the precise time of the taking before the United States can be said to have intended to take the property, and if, by a proclamation addressed "To Whom it May Concern", the United States takes property, can it be said that the mere similarity of the name of the terminal and the name of the owner of part of the estate, precludes the rest? If fundamental principle must defeat the plaintiff in this case, it should be a fundamental principle of practical universal application. In order to sustain this decision of the Court of Claims, the Fifth Amendment must be held to mean that private property shall not be taken for public use without just compensation, *provided that* at the precise time of the taking the United States has precise knowledge of the particular individual who owns the particular property taken.

POINT II.

All that was done was specifically authorized by the President's proclamation taking possession and control of the property described and addressed not to the Bush Terminal Company but "to whom it may concern".

The Bush Terminal Company's name is not mentioned in the requisition order. What was to be taken was property described by a schedule and a map, not by name of, but regardless of the names of the owners. The Bush Terminal Company's name is not mentioned in the order of the

Acting Quartermaster General to the General Superintendent of the Army Transport Service. That order directed that possession and control of property described by a schedule and shown on a map be taken in conformity with an order addressed not to the Bush Terminal Company, or to any other person, firm or corporation, but "To Whom it May Concern". That order did not limit the authority of the General Superintendent of the Army Transport Service to the taking of the property of the Bush Terminal Company. On the contrary, it, in effect, directed him to take possession and control of the described property regardless of whom it concerned. It follows that since this requisition order concerned Duckett's property and since the authorized agent of the Government took the property specified in the proclamation order from the party it concerned, that officer was specifically authorized to do what he did and the taking of Duckett's property from Duckett was not tortious, but authorized.

POINT III.

The requisition of Duckett's property suspended the operation of Duckett's lease with the Bush Terminal Company; it did not terminate it.

The Bush Terminal Company had agreed to warrant and defend the possession and the use of the Pier for Duckett. Since possession was taken by the Sovereign of both, the obligations of both under the lease were suspended, while the Sovereign was in possession.

Gale, etc. *vs.* Goodloe, 101 U. S. 612.

The lessee is entitled to the value of the lease over the rent during the term of the Sovereign's occupation.

Corrigan *vs.* Chicago, 145 Ill. 537.

Governmental taking of a leasehold does not merely frustrate a right of action of the lessee against the lessor, but constitutes a direct taking of the lessee's property, an estate or interest in the land itself. This is not a case of consequential damage by an authorized Governmental action. Here the plaintiff's rights have not merely been frustrated or ended but "possession and occupation", its estate in the land, has been directly taken.

In the case of *Omnia Commercial Co.* vs. *U. S.*, 261 U. S. 512, the plaintiff sought to recover consequential damage as if such damage was property—a right of priority. Plaintiff had a contract by which he acquired the right to purchase steel plate from the Allegheny Steel Co. at a price under the Market. Before deliveries were made the United States requisitioned the Steel Company's entire production and directed that Company not to comply with plaintiff's contract under pain of having its entire plant taken over and operated for the public use. The complaint alleged that thus the United States took plaintiff's right of priority and thereby appropriated plaintiff's property to the public use and sought just compensation under Article V of the Constitution.

The Court held that the conclusion to be drawn from the cases is that for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. There must be a direct appropriation as distinct from consequential

damage resulting from lawful governmental action.

The plaintiff's position was that since the Government requisitioned the future production of the Steel Company and since but for such requisition the plaintiff would have received its steel, it follows that the Government "took" plaintiff's steel. "This, however, is to confound the contract with the subject matter".

This contract was wholly executory. The Government did not take the right to enforce the contract which was all that the plaintiff had. As a result of this lawful Governmental action, the performance of the contract was rendered impossible. It was not appropriated but ended.

If one makes a contract for the sale and delivery of property, the Government by requisitioning the subject matter does not thereby take the contract. Frustration and appropriation are essentially different things. To point out the difference, the Court cites the case of *Monongahela Navigation Co. against the United States,* 148 U. S. 312, where a lock and dam were constructed and the Company gave a franchise to exact a toll "the contract, therefore, was, not merely a contract in respect of the property taken, but an integral part of it". So in the case at bar, what the Government took was not an executory contract for the future delivery of possession and control of Pier 8. It took Duckett's estate for years. Duckett's lease was not merely a contract in respect to Pier 8; it was an integral part of the property itself and the only part of the property that the Government took.

If Duckett instead of owning an estate for years in Pier 8, had had at the time of requisition only a contract by which the Bush Terminal Company

agreed to convey such an estate at some time in the future, the Omnia case would be analogous to the case at bar. Under such circumstances there would be a mere frustration of a contract and not an appropriation of property. But the facts actually are that such a contract had already been performed and Duckett was the owner of the estate for years in possession—the property requisitioned. It is as though in the Omnia case the plaintiff's contract had been performed and the steel delivered to it and then requisitioned. In such event it is clear, from the Court's reasoning, that its opinion would have been to the contrary of that rendered. And so, in the instant case, it is equally clear that there has been a taking by the Government of the plaintiff's property for which it is entitled to just compensation.

POINT IV.

The judgment and order dismissing the petition should be reversed and the case remanded with direction to enter judgment for the appellant for the value of the use and occupation of the pier as found by the Court of Claims.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1924

A. W. DUCKETT & COMPANY, INC., APPELLANT
v.
THE UNITED STATES
No. 108

APPEAL FROM THE COURT OF CLAIMS

BRIEF ON BEHALF OF THE UNITED STATES

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims dismissing the petition upon findings of fact made after trial of the issues.

Duckett & Company sued the United States in the Court of Claims, according to paragraph 2 of Petition (page 1) "upon an implied contract with the Government of the United States under the general jurisdiction of this court" conferred by section 145 of the Judicial Code. That court concluded that no contract had been shown and for that reason dismissed the petition.

15366—24——1

THE FACTS

Duckett & Company was a New York corporati
engaged in the shipping business (First Findi
page 8), and on December 31, 1917, was in possessi
of a pier known as Pier 8 under a lease from t
Bush Terminal Company, which had been execut
on the 19th day of September, 1916, for a period
three years beginning on the first day of Octob
1916, at an annual rental of $60,000. (Second Fi
ing, page 11.)

From August 24, 1917, to February 11, 1919, p
of the period involved, the business of Duckett
Company was in the hands of John S. Sheppa
Jr., receiver, appointed by the Judge of the Distri
Court of the United States for the Southern Distri
of New York.

The Bush Terminal, owned and operated by t
Bush Terminal Company, consisted in part of eig
large piers, numerous large warehouse buildings, a
railroad tracks extending from main-line railroads
said warehouses and on to said piers. (Third Findi
page 9.)

Pursuant to the authority vested in the Preside
of the United States, the Secretary of War, by dire
tion of the President, took possession of the Bu
Terminal, including Pier 8, under a general ord
which appears at length in the Fourth Finding (pa
10). This order recites that it is made pursuant
the Act of Congress approved August 29, 19
(Ch. 418, 39 Stat. 645), and by Section 10 of the A
of Congress approved August 10, 1917 (Ch. 53,

Stat. 279), this latter Act being the so-called Lever Act. This order recited that—

> possession and control is hereby taken, by direction of the President, of the following described parts of a system of transportation, including storage facilities; that is to say, of those portions of the Bush Terminal docks and warehouse property described in Schedule A and shown on the map of Schedule B, hereto annexed, in New York Harbor, to the end that they may be utilized to the exclusion of all other traffic, so far as may be necessary, and for such time as may be required, for the transportation of troops, war material, and equipment, for the storage of military supplies, * * *. Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises, and also the fair compensation to be paid for the property in the event that the Government shall determine prior to July 1, 1918, to acquire absolute title thereto.

Thereafter, under date of January 3, 1918, the Acting Quartermaster General addressed to the Bush Terminal Company a notice (set forth in full in the Fourth Finding, pp. 10–11) which is practically identical in terms with the order theretofore issued by the Secretary of War.

On December 31, 1917, there was addressed to the General Superintendent of the Army Transport Service a telegram signed by the Acting Quartermaster General, as follows:

> An order has been issued by the President this date for taking possession and assuming

> control of those portions of the Bush Terminal docks and warehouse property known to you and described in Schedule "A" and shown on the map on Schedule "B" attached thereto. In conformity with said order you will take possession and assume control of the premises from this date. (Fourth Finding, page 11.)

On January 14, 1918, there was served upon the receiver for Duckett & Company by an officer in the Army in charge of the Division of Docks, Wharves, and Terminals a notice set forth in the Fifth Finding (page 12). This notice is headed "Notice to vacate." It recites that by authority of the President of the United States "the Bush Terminal has this day been requisitioned for the use of the embarkation service of the United States Army, and possession thereof has passed to the United States"; that "it is necessary that the Government have full benefit of these premises at the earliest possible date"; that "it is desired, however, not to inconvenience the present occupants to the extent that may bring upon them any extensive financial losses. You will therefore immediately communicate with 1st Lieutenant H. S. Cole, U. S. A., Retired, officer in charge of the Division of Docks, Wharves, and Terminals of this office, and make arrangements for the vacation of the premises now occupied by you." And that "until further notice all payments or moneys due in respect of any period commencing on or after January 1, 1918, will be made to the

Bush Terminal Company for account of the United States."

In consummation of negotiations between the receiver and the officer in charge, the receiver was permitted to remain in possession for the remainder of the month of January, and the United States took actual possession of the pier at midnight of January 31, 1918. (Fifth Finding, page 12.)

When the terminal properties were taken over by the United States a part was in possession of the Bush Terminal Company unleased and a part was under lease. An advance payment of $1,000,000 was made to the Bush Terminal Company to be applied on compensation for the use of the properties taken, or upon the purchase price in the event the United States should determine prior to July 1, 1918, to acquire title, and a board of appraisers was appointed by the Secretary of War to determine the compensation to be paid the Terminal Company for the use of the properties and also to determine the value of the properties in the event that the United States should conclude to acquire title. These appraisers made an award, which is set forth in the Sixth Finding, page 13.

The report of the appraisers shows that the United States did requisition the temporary use and occupancy of a portion of the premises known as the Bush Terminal; that just compensation for the use and occupancy of that portion of the premises not under lease $89,807.71 per month, which monthly sum is increased from time to time as the respective

leases for other portions of the premises terminate and as further increased by the monthly reserve rent due to the Bush Terminal as provided by the respective leases (except the lease to Duckett & Company for Pier 8, which reserved rent is reduced from $5,000 per month to $2,325 per month), and which reserved rent has heretofore been agreed shall be paid to the Bush Terminal instead of to the respective tenant. After making certain adjustments an award was made as of December 31, 1918, to the Bush Terminal of $880,963.63. From that amount there was to be deducted all sums collected by the Bush Terminal as rent from tenants who had occupied any of the premises after January 3, 1918, and the just compensation to be paid the Bush Terminal from January 1, 1918, was, for that part of the said premises which were not under lease when the property was taken over, $89,807.71 per month, and for the remaining portions amounts set forth in a schedule of 45 items, the rentals stated in the schedule being the rentals reserved in the leases of the various tenants except that the rental of Pier 8 was reduced from $5,000 per month, as provided in the lease, to $2,325 per month. This award was accepted by the Bush Terminal Company and paid by order of the Secretary of War. (Sixth Finding, page 14.)

The receiver for Duckett & Company paid the Bush Terminal Company the rental as provided in the lease for the month of January, 1918, but paid no rental thereafter. In the latter part of January a bill, in usual course, dated February 1st, for the

February rental was sent to the receiver, who at once wrote the Bush Terminal Company, stating that he had been served with notice to vacate the pier and had arranged with the officer in charge that the pier should be surrendered to the United States on the night of January 31st, and in reply the Bush Terminal Company directed him to destroy the bill.

For the use of the pier in unloading a vessel during the month of January subsequent to the service of the notice to vacate, during which period the receiver had been permitted to remain in possession, he collected and retained the charges. The unloading not being completed until some time in the month of February, the receiver, by authority of the officer in charge, collected the charges and paid that portion thereof to the United States.

For the period beginning February 1, 1918, the United States paid the Bush Terminal Company for the use of all properties taken over, including a payment on the basis of $2,325 per month for the use of Pier 8, and the Bush Terminal Company accepted the payments made as full compensation for the use of all the properties taken. (Seventh Finding, pp. 14–15.)

At midnight April 30, 1919, the United States vacated Pier 8 and surrendered possession to the Bush Terminal Company, and that company executed to the United States a release set forth in the Eighth Finding (page 15), releasing the United States "from any and all claims from suits, debts, obligations, and liabilities of whatsoever kind and nature

which may arise or may have arisen by reason of occupation of said premises by the United States under requisition by Act of Congress," etc.

On April 12, 1919, Duckett & Company, being advised that the United States would shortly release Pier 8, notified the Bush Terminal Company that immediately upon such release it would take over the pier "as per lease dated September 19, 1916." The Terminal Company on April 17th acknowledged the communication and said:

> The United States, as we are advised, proceeded upon the theory that our leases were not extinguished by their action in commandeering our property. If it is your desire to proceed upon that theory, and you will pay to us the rent reserved in your lease, and take credit only for the payment made to us by the Government, we will not object to your going into possession again.

On April 19th the Terminal Company requested of Duckett & Company a speedy reply to its letter of the 17th in order that the matter might be speedily disposed of, and on April 22d Duckett & Company wrote the Terminal Company as set forth in the Ninth Finding (Page 16), taking the position that the Terminal Company was not entitled to the difference between the rent reserved in the lease and the rent received from the Government, and saying:

> The seizure of the pier by the Government created a situation whereby you could not fulfill the terms of the lease because you could not give us possession of the pier and therefore

the consideration for the rent reserved failed. We certainly do not intend to pay for what we did not get.

We are content to stand upon the fair ground that the emergency under which the Government seized the pier suspended temporarily the lease between us, but now that the Government is returning the pier we intend to maintain our rights and insist upon possession from the day the Government vacates, under the terms of the lease.

It seems to us that that is the fairest way for both of us to handle the situation, and we are advised that it is our right to demand possession of the pier when the Government vacates.

Thereafter the Bush Terminal Company, being advised by counsel that Duckett & Company had forfeited their rights under the lease and that the Terminal Company was privileged to relet the pier to others, did so relet it. (Ninth Finding, page 16.)

It is to be noted that the order under which the property was taken and other documents in the case recite that the action was taken under both the Act of August 29, 1916, an Army Appropriation Act providing for the possession and control of systems of transportation, in time of war, and Section 10 of the Lever Act, providing for the requisitioning of storage facilities. It is, of course, obvious why both Acts were recited.

The Bush Terminal property partook of the nature of a transportation system and also of a storage

system, and the mentioning of both Acts was a proper precaution. But the Act of 1916 made no provision for ascertainment of the compensation to be paid to those whose property was taken, while the Act of 1917 (the Lever Act), made specific provision. The President was to ascertain the compensation and pay it. In case the owner refused to accept the amount thus fixed, he could receive 75 per cent of it and sue in the District Court for the balance necessary to constitute just compensation and under the Lever Act the jurisdiction of the District Court was exclusive. (*United States* v *Pfistch*, 256 U. S. 547.)

The provision in the Army Appropriation Act of August 29, 1916 (39 Stat. 645) was as follows:

> The President, in time of war, is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

The plaintiff, bringing its suit in the Court of Claims, chose to base its claim, not upon the Lever Act, but upon the implied contract arising from action taken pursuant to the Act of 1916. The Court of Claims held that it had jurisdiction under this theory of the case. It held, however, in accordance with

well-known precedents, that the facts proved show neither a taking of property within the meaning of that expression as settled by the courts, nor an implied promise to pay.

ARGUMENT

The Court of Claims gave this case most careful consideration, and but little can be added to the opinion of Judge Downey, speaking for that Court. The plaintiff having specifically invoked the general jurisdiction of that court upon an implied contract, the Court properly held that the case must be governed by the principles established with respect to the jurisdiction of that court under such claims. *United States* v. *North American Trans. Co.*, 253 U. S. 330.

It appears (page 26) that the opinion was prepared before the opinion of this Court in *Omnia Commercial Company* v. *United States*, 261 U. S. 502, was handed down, but the views expressed are in harmony with the views expressed by this Court in the latter case. Indeed, the cases seem to be strikingly similar.

In the present case, the Court of Claims concluded that upon the facts found there was not such a taking from Duckett & Company of its property as gave rise to an implied promise to pay therefor.

Nothing done by the officers of the United States was, in terms, directed at taking over Duckett & Company's leasehold. The Secretary of War took the docks, piers, and warehouses belonging to the Bush Terminal Company. It was the subject matter

of the plaintiff's lease that was taken, not the lease itself. The notice to the receiver of Duckett & Company made no mention of that company's lease, and did not purport to take it or requisition it. The notice stated that the "Bush Terminal has this day been requisitioned" and that it was necessary that the Government have full benefit of the premises at the earliest possible date. It further stated that it was not desired to inconvenience the present occupants to the extent of bringing upon them any extensive financial losses, and suggested that arrangements be made with the officer in charge for vacating. Thereupon arrangements were made whereby the receiver of Duckett & Company was allowed to remain in possession until the pending occupation of the pier by ships was concluded, and the actual possession of the United States was deferred for a month.

In its dealings with the Bush Terminal Company the Government showed no intention of assuming or taking over the existing leases. If such had been the intention of the parties, of course the United States would have substituted itself for the lessee, paid the rent, and performed the other conditions of the lease. When, however, it took up with the Bush Terminal Company the question of compensation, an agreement was reached whereby the rental paid for this pier was reduced from $5,000 a month to $2,325 a month, and that rent was thereafter paid to the Bush Terminal Company and not to Duckett & Company or its receiver. It does not appear that any contention was made at this time by the receiver that

Duckett & Company's leasehold was being commandeered or otherwise taken; and when the war was over and the United States terminated its possession of the premises, Duckett & Company took the position that its lease had not been extinguished, but merely temporarily suspended. No other construction can be put upon the letter which Duckett & Company wrote the Terminal Company on April 22, 1919, in which they said:

> We are content to stand upon the fair ground that the emergency under which the Government seized the pier suspended temporarily the lease between us, but now that the Government is returning the pier we intend to maintain our rights and insist upon possession from the day the Government vacates, under the terms of the lease.
>
> It seems to us that that is the fairest way for both of us to handle the situation.

We have, therefore, a situation where the United States requisitioned and took the physical property belonging to the Bush Terminal Company; recognized that company's title and ownership; proceeded in a lawful manner to adjust the matter of compensation; reached an amicable agreement with that company and paid that company the agreed compensation. It never recognized any title in Duckett & Company or its receiver, much less any obligation on its part to pay Duckett & Company. It must be remembered that the Duckett lease was made subsequent to the Act of Aug. 29, 1916, and was, there-

fore, subject to the exercise by the Government of the powers conferred by that Act. It does not appear that any protest was made by the receiver or that he at that time asserted any claim based upon a taking of the property in his possession. There is nothing which indicates that Duckett & Company and its receiver claimed that their property was being taken, or that the officers of the United States promised or expected to pay. Certainly, there was no express promise, and under the authorities it does not seem that there was an implied promise. It is not the actual taking or using of property which constitutes such a "taking" as gives rise to the implied contract to pay which must be the basis of a recovery in the Court of Claims. *Tempel* v. *United States,* 248 U. S. 121; *Hill* v. *United States,* 149 U. S. 573; *Langford* v. *United States,* 101 U. S. 341; *Omnia Commercial Company* v. *United States,* 261 U. S. 502.

In the *Tempel case* the United States assumed that it had the right to submerge and navigate over and further dredge the plaintiff's land, which facts, it was held, precluded the implication of a promise to pay, although the United States did in fact dredge and submerge and in fact take plaintiff's land.

In the *Hill case* the United States asserted a right to the use of the land in question as against the plaintiff, and it was held that the action should have been dismissed for want of jurisdiction.

In the *Langford case* it was held that where an officer of the Government asserted ownership in the

United States and takes forcible possession of the land of the individual for the use of the Government there does not arise such an implied contract to pay as is necessary to give the Court of Claims jurisdiction.

In the present case the claim of the United States was that it had acquired this property from the Bush Terminal Company, and that by virtue thereof it was entitled to immediate possession, a position wholly inconsistent with a recognition of any right in Duckett & Company or its receiver. Aside from the fact that the receiver seems to have acquiesced in this claim, upon the authority of the cases cited no promise to pay can be implied.

In *Omnia Commercial Company* v. *United States*, 261 U. S. 502, the Government, for war purposes, requisitioned the entire production of a steel manufacturer, rendering impossible and unlawful of performance an outstanding contract between a manufacturer and a customer. It was held that the customer's rights were not taken by the Government, but frustrated by its lawful action. That case was also an appeal from the Court of Claims. A question was raised in that case as to the statutory authority of the officer who made the order of requisition and gave the directions respecting noncompliance with the contract, but this Court assumed, for the purposes of the case, that he was authorized. Mr. Justice Sutherland, delivering the opinion of the Court, pointed out that the contract in question was property within the meaning of the Fifth Amend-

ment, and if taken for public use the Government would be liable, but that destruction of or injury to property is frequently accomplished without a taking in the constitutional sense; that an appropriate exercise by a State of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of property values; that the United States may, consistently with the Fifth Amendment, impose, for a permitted purpose, restrictions on property which produce like results; that the provision of the Fifth Amendment has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power, and that for consequential loss or injury resulting from lawful governmental action the law affords no remedy. In the course of the opinion it was said (page 511):

> In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated, but ended.

And at page 513:

> In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the Government.
>
> The Government took over during the war railroads, steel mills, shipyards, telephone and

> telegraph lines, the capacity output of factories, and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things.

The conclusion of the Court in that case was based upon an exhaustive examination of authorities, both American and English, and would seem to be decisive of the questions here presented.

The effect of the requisition of the Bush Terminal was to bring existing contracts which its owners had made to an end, not to keep them alive for the use of the Government; or if the position taken by Duckett & Company after the Government's use had ended was correct it may be that instead of bringing Duckett & Company's lease to an end it merely "suspended temporarily the lease." It can not be that the Government, in the emergency existing on January 1, 1918, can be held to have been under the necessity of going through the property of the Bush Terminal Company, requisitioning berthing space for one ship from one tenant and for another ship from another tenant, and warehouse space from various tenants. What it did was to requisition the property, and when it had done so it assumed the rights of ownership; settled with the Bush Terminal Company, and proceeded under the distinct claim that its action gave

it rights to which those having existing contracts with the Bush Terminal Company must bow.

As the Court of Claims said (page 25):

> We can not assent to the theory that if the President for war purposes took from the owner the use of a large office building, occupied by many tenants, such a taking became the basis of an additional implied contract as between the United States and each tenant.

While the record does not show affirmatively that any action was taken by the receiver based upon a claim that property in his charge was being appropriated by the Government for which he expected payment, there is enough to warrant the inference that the claim finally made in the Court of Claims, and now made here, is the result of an afterthought, and this has an important bearing upon the question of a contract implied in fact. It is to be remembered that the receiver was an officer of the Court, and presumably did whatever his duty required him to do. It appears from the memorandum of the Court of Claims denying the motion for a new trial that there was something in the evidence relating to a claim made by the receiver to the Board of Appraisers; that the Court acted deliberately in omitting such matter from the Findings, and that the matter then sought to be incorporated in the Findings was not asked by the plaintiff in its original requests. (Pages 28–29.) The Court says (page 29), referring to the plaintiff:

> It did not originally, and it does not now, ask to have the Findings show that its receiver

> did in fact file a claim with this board of appraisers and that this claim was disallowed. The fact in this respect is that upon argument of this case the plaintiff sought to, and, so far as it could, did, repudiate the claim filed by the receiver with this board. The counsel then stated to the court that the receiver did not properly understand the situation when he filed that claim, and that plaintiff should not be bound thereby.

Whatever was done or omitted by the receiver may not be important except for its bearing upon the question of fact whether a contract to pay can be inferred from what was or was not done by the parties at the time. The nature of the receivership does not appear except (p. 9) that it was a temporary receivership; and we must remember that the Bush Terminal people voluntarily agreed with the United States for a rental for this pier at less than half the amount reserved in Duckett & Company's lease. It is not improbable that the receiver regarded this lease as a liability rather than an asset, and was glad to be relieved of it by the action of the Government. At any rate, there was no protest by the receiver, no claim that property entrusted to his care by the court was being taken from him, and no promise on behalf of the United States to pay him.

This view is confirmed when, months afterwards, and when the transaction is all over, we find the plaintiff itself, not the receiver, writing to the Terminal Company that it is content to stand upon the fair ground that the emergency under which the Govern-

ment seized the pier "suspended temporarily the lease between us." So we say that the Court of Claims was right in holding that the facts showed no implied contract imposing liability upon the United States.

The Court of Claims, in its opinion (page 25), suggests whether the taking over of the Bush Terminal from the owner did not terminate the leases of the tenants, and refers to the case of *Gates* v. *Goodloe*, 101 U. S. 612, saying that while the question decided went only to the liabilities of the lessee to pay rent—

> the authorities cited go far to sustain the conclusion that in such an event private contracts inconsistent with the exercise of a sovereign right are dissolved.

In the case at bar, the act of August 29, 1916, was in force at the time the Duckett lease was made (September 19, 1916). It seems to us that all contracts relating to transportation systems must have been made subject to the provisions of that act. In other words, that it must be held that the provision of the act was in effect written into and became a part of all subsequent contracts.

CONCLUSION

The judgment should be affirmed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

OCTOBER, 1924.

○

A. W. DUCKETT & COMPANY, INC. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 108. Argued October 23, 24, 1924.—Decided November 17, 1924.

Possession of terminal property, including a pier on which the claimant had a lease from the owner, was requisitioned and taken by the President temporarily for war purposes (Act of August 29, 1916,) under a general public notice and promise of compensation. *Held* that claimant's leasehold interest being part of the *res*, was taken, and that a promise upon the part of the Government to pay for it was implied. P. 151. *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, distinguished.
58 Ct. Clms. 234; *id.*, 403, reversed.

APPEAL from a judgment of the Court of Claims rejecting a claim for the value of a leasehold interest in property requisitioned during the late war.

Mr. Don R. Almy, with whom *Mr. Ernie Adamson* was on the brief, for appellant.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a claim against the United States for the value of the claimant's interest in Pier No. 8 of the Bush Terminal Company under a lease that ran through Sep-

tember 30, 1919. The claim is based upon an implied contract alleged to have arisen from a taking for war purposes, for such time as might be necessary, of described portions of the Bush Terminal docks and warehouses, including the claimant's pier. The Court of Claims dismissed the petition for want of jurisdiction upon the ground that the facts found excluded as matter of law the possibility that a contract should be implied and that therefore there could be no claim. *Hill* v. *United States*, 149 U. S. 593.

Under the Act of August 29, 1916, c. 418, 39 Stat. 619, 645, giving the President authority to take possession of any system of transportation, he took possession through the Secretary of War of the Bush Terminal, in Brooklyn, New York, including Pier No. 8, the Secretary issuing a general order dated December 31, 1917, "To whom it may concern," which stated that "possession and control is hereby taken . . . of the following described parts of a system of transportation . . . ; that is to say, of those portions of the Bush Terminal docks and warehouse property described" &c. "Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises." Notice of this order was served on the Bush Terminal Company on or about January 3, 1918, and at about the same time the receiver of A. W. Duckett & Company was notified that "the Bush Terminal has this day been requisitioned for the use of the embarkation service of the United States Army, and possession thereof has passed to the United States," and he was directed to make arrangements for vacating the premises. As the result of conferences the United States took possession of the pier at midnight, January 31, 1918.

It is unnecessary to go into the details of what was done later, as the acts that we have stated determined the relations of the parties. On the face of those acts

it seems to us manifest that the United States, although not taking the fee, proceeded *in rem* as in eminent domain, and assumed to itself by paramount authority and power the possession and control of the piers named, against all the world. Ordinarily an unqualified taking in fee by eminent domain takes all interests and as it takes the *res* is not called upon to specify the interests that happen to exist. Whether or not for some purposes the new takers may be given the benefit of privity with the former holders, the accurate view would seem to be that such an exercise of eminent domain founds a new title and extinguishes all previous rights. *Emery* v. *Boston Terminal Co.*, 178 Mass. 172, 184. *Farnsworth* v. *Boston*, 126 Mass. 1, 8. In such a case we no more should expect to hear it argued that leaseholds were not to be paid for than that the former fee simple should not be, on the ground that it was gone and a new fee begun. A right may be taken by simple destruction for public use. *United States* v. *Welch*, 217 U. S. 333, 339. See *Peabody* v. *United States*, 231 U. S. 530, 538. Here the taking purported to be a taking of the Bush Terminal docks, &c.—not of the title of the Bush Terminal Company, but of the things, to whomsoever they belonged. The notice was "to whom it may concern." The claimant was turned out like the others. We can see no ground for attributing to the United States the extraordinary intent to recognize and pay for other interests but to exclude the claimant. The order made no such distinction but promised fair compensation, seemingly to all, and the subsequent appointment of a board of appraisers contemplated payment to tenants. Any arrangement that the Government may have made later with the owner to pay to it what might be due to the tenants or some of them did not affect the claimant's rights.

Omnia Commercial Co. v. *United States*, 261 U. S. 502, which was thought to give some color to the decision below, has no bearing upon the present question. There the Government made a requisition of the entire product of a Steel Company for a year. On the assumption that the Government thereby made it impossible for the Steel Company to perform a contract to sell a large quantity of steel plate to the claimant, the decision was that nevertheless the contract was not taken. The contract was no part of the *res* taken and whatever might be the collateral consequences of the appropriation liability for them was not an incident of the Government's act. 261 U. S. 510. Here the claimant's possession under its lease was a part of the *res*, and therefore was within the implied promise to pay. Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims. *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330.

Judgment reversed with directions to award proper compensation to the appellant.